standard to reject the plaintiff's request for relief from the consequences of failure to comply with a conditional discovery order).

But Larkin is not entitled to that relief. CPLR 5015(a)(1) provides that a court may relieve a party of a judgment or order where, among other things, the moving party demonstrates a reasonable excuse for the default. *Caba v. Rai*, 63 A.D.3d 578, 578 (1st Dep't 2009). Here, it was well within Supreme Court's broad discretion to conclude that Larkin had not. *See Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374 (1st Dep't 1990) (denial of motion under CPLR 5015(a)(1) reviewed for abuse of discretion). The court had ordered him to provide the transcripts from his criminal trials four different times over three years, but Larkin failed to comply with those orders, and with a conditional order automatically dismissing his complaint if he did not comply. Then, over the next four years, Larkin made sporadic attempts to avoid the consequences of that order, while still failing to comply. Thus, despite ample opportunity to cure his default, Larkin has never done so, and Supreme Court was not required to excuse his cavalier response to its orders.

On appeal, Larkin primarily insists that Supreme Court should not have entered the discovery orders as an initial matter because it could not order him to produce discovery that was not in his possession, but that argument is unpreserved and meritless. In objecting to the orders below, Larkin made a different argument, and in any event, Larkin's disagreement with the orders did not excuse his failure to comply with them once they had been entered. Moreover, Larkin's new contention

relies on a misunderstanding of the cases he cites, and the conditional order was fully proper.

A. Larkin failed to show that his failure to comply with the November 2014 conditional order was excusable

Supreme Court providently determined that Larkin had not shown that vacatur of the conditional order striking his complaint was proper. At the time the court issued its conditional order, Larkin did not provide a reasonable excuse for his failure to comply the 2014 conditional dismissal order. Nor did he offer one in his motion for the court to relieve him of his consequences for his failure to comply with that dismissal. For example, Larkin did not claim that he was unaware of the conditional order, or that he did not understand that Supreme Court had held several years before, over his objection, that it was his obligation to produce the transcripts. Nor did he claim that he had made diligent efforts to comply with Supreme Court's order, but failed.

Instead, as the record makes clear, Larkin was well aware of the conditional order, and of the earlier orders directing him to produce the transcripts. As early as December 2012, he told defendants that he was making efforts to obtain the transcripts (R372). But he apparently opted not to follow through with that representation, or to comply with the court's orders either when it first issued them or when his complaint was struck for failing to comply with them. And he still has not complied.

Instead, Larkin has repeatedly taken the position that he is excused from complying with the orders because Supreme Court erred in issuing them as an initial matter (R11, 199). But as this Court recently reaffirmed, disagreement with a court's discovery orders is "not a reasonable excuse for [that party's] failure to comply with [the court's] directives." *Jones v. Fegs-Wecare/Human Res.*, 194 A.D.3d 523, 524 (1st Dep't 2021); *accord Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512.

Indeed, if Larkin disagreed with the court's first three discovery orders directing him to produce the transcripts, he could have taken action at that time. For example, he could have appealed the orders or, if an appeal did not lie, sought to vacate them and then appealed the denial. It was not reasonable for him to knowingly and willfully ignore four discovery orders, including a conditional order dismissing his complaint, over three years. And Supreme Court was not required to relieve Larkin of the consequences of that conduct. *See Jones*, 194 A.D.3d at 524; *Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512.

That is especially so where Larkin has continued to display a cavalier attitude toward Supreme Court's orders even after the complaint was struck. Larkin did not take any action within the thirty-day period set by the conditional order, but waited until after the period expired to seek reargument (R8-9). Then, when Supreme Court informed him that reargument was an improper procedural vehicle, he waited another year and half before filing a motion to vacate (R196-97). And when he did file it, he failed to appear for two oral arguments on his own motion, resulting in its

dismissal and requiring Larkin to file a third motion to relieve himself of the consequences of his successive defaults.

On appeal, Larkin's primary contention continues to be that Supreme Court erred in resolving the discovery dispute as it did (*e.g.* App. Br. 11-12). But as already explained, that is not a reasonable excuse. It is also incorrect, as explained below.

Larkin also briefly asserts, in his preliminary statement, that he "could not obtain" the transcripts and that he did not have the financial means to obtain them (App. Br. 1-2). But the record contains no indication that Larkin ever made any showing below that he could not obtain the transcripts, but only that he *should not* be required to obtain the transcripts. The argument is thus unpreserved. *See Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D.3d 538, 539 (1st Dep't 2015) (arguments may not be raised for the first time on appeal). In any event, he cites no record support or provides any further detail for this argument. It therefore cannot constitute a reasonable excuse. *See Reidel v. Ryder TRS, Inc.*, 13 A.D.3d 170, 171 (1st Dep't 2004); *Montgomery v. Colorado*, 179 A.D.2d 401, 402 (1st Dep't 1992); *Periphery Loungewear*, 214 A.D.2d 428 (1st Dep't 1995).

Although Larkin did claim in his 2015 reargument motion that he could not afford the transcripts (R11), he did not make that argument in the motion to vacate that is the subject of this appeal, and it is therefore also unpreserved. In any event, before Supreme Court, as on appeal, Larkin wholly failed to substantiate or explain this contention as well, and it therefore is not a reasonable excuse. Larkin provided no detail or substantiation of the actual costs of the transcripts, nor did he provide

any detail about the state of his finances. Indeed, as the City argued in Supreme Court, if Larkin could not afford to produce the transcripts of the trials that served as the basis for his own claim, there were procedural protections available to him (R253). But having failed to avail himself of those protections, his conclusory assertions that he could not afford the transcripts do not constitute a reasonable excuse.

Next, Larkin implies that he was not, in fact, ordered to produce the transcripts, and that the burden of production was instead placed on both parties (App. Br. 17). This contention misunderstands the record. The initial CSO placed the burden on Larkin to produce the criminal file (R176), and four subsequent orders (from 07/2011, 02/2014, 04/2014, and 11/2014) expressly placed the burden on Larkin to produce the transcripts from his criminal trials (R176, 178, 183-85). And as the December 2012 discovery response confirms, Larkin understood producing the transcripts to be his obligation (R372). The two orders Larkin cites—from March 2012 and October 2013—merely make a deposition contingent on any party obtaining the transcripts and encourage all parties to make efforts to obtain the transcripts (R179, 181). Neither order placed the onus on the City, and even if they had, they were plainly superseded by multiple orders requiring Larkin to do so (R425, 426, 430). Larkin has thus failed to come forward with a reasonable excuse for his failure to comply.

B. In any event, the November 2014 conditional order was fully within the court's discretion.

Because Larkin's disagreement with the discovery orders did not provide a reasonable excuse to ignore them, this Court may, and should, affirm the denial of Larkin's motion on that ground. In any event, to the extent that Larkin insists that the order was legally erroneous, his contentions are meritless.

"[C]ourts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them." *Catalane v. Plaza 400 Owners Corp.*, 124 A.D.2d 478, 480 (1st Dep't 1986). Accordingly, CPLR 3126 grants courts broad discretion to impose such penalties "as are just" on a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Penalties include prohibiting the party from presenting testimony or evidence at trial, *see* CPLR 3126(2), or striking the party's pleading, *see* CPLR 3126(3). "[A] penalty imposed pursuant to CPLR 3126 should not be readily disturbed absent a clear abuse of discretion." *Fish & Richardson, P.C. v. Schindler*, 75 A.D.3d 219, 220 (1st Dep't 2010).

An order striking the pleadings under CPLR 3126(3) is warranted where the court determines that the non-compliance is willful and contumacious or in bad faith. *See Pimental v. City of New York*, 246 A.D.2d 467, 468 (1st Dep't 1998); *Furniture Fantasy, Inc. v. Cerrone*, 154 A.D.2d 506, 507 (2d Dep't 1989). This Court has repeatedly held that willful and contumacious conduct may be inferred from a recurring failure to comply with disclosure orders. *See, e.g., Keller v. Merchant*

Capital Portfolios, LLC, 103 A.D.3d 532, 532 (1st Dep't 2013) ("[Plaintiff's] failure to comply with three court orders directing it to produce certain materials—one of which was a conditional order striking its answer if [he] did not comply within 45 days—warrants an inference of willful noncompliance"); *Rodriguez v. United Bronx Parents, Inc.*, 70 A.D.3d 492, 492 (1st Dep't 2010) ("[P]laintiff established that defendant's failure to comply was willful and contumacious, given its repeated and persistent failure to comply with five successive disclosure orders."). If the evidence supports an inference of willful and contumacious failure to comply with discovery orders by a party, it is the party's burden to come forward with a reasonable explanation for that failure. *See Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512; *Pimental*, 246 A.D.2d at 468.

Applying these standards here, Supreme Court's conditional order was fully proper. Over the course of the preceding three years, Larkin had failed to comply with three separate court orders directing him to produce the transcripts from his criminal trial. If he failed to comply with the conditional order, he would fail to comply with a fourth. Supreme Court could properly infer from those repeated failures to comply that his conduct was willful and contumacious, and his apparent disregard for his discovery obligations and for Supreme Court's disclosure orders warranted the striking of his complaint. *See Fish & Richardson*, 75 A.D.3d at 219 ("If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." (quoting *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999))). Indeed, this Court has found the striking of a party's pleadings to be

proper based on similar, and even fewer, failures to comply with court orders. *See, e.g.*, *Reidel v. Ryder TRS, Inc.*, 13 A.D.3d at 171 (failure to appear for three depositions scheduled by three court orders constituted willful and contumacious conduct warranting striking of pleading); *Flores*, 246 A.D.2d at 467 (striking pleading where party failed to obey one discovery order).

Larkin's failure to comply with a conditional order further supports dismissal. On facts similar to these in *Santiago v. City of New York*, this Court upheld Supreme Court's dismissal of the complaint "as a sanction for plaintiff's persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that was granted on default and became absolute." 77 A.D.3d 561, 561 (1st Dep't 2010). *Accord Trabanco v. City of New York*, 81 A.D.3d 490, 491 (1st Dep't 2011) ("a conditional order becomes absolute upon a party's failure to comply with its provisions") (citing *Rampersad v. New York City Dept. of Educ.*, 30 A.D.3d 218 (1st Dept' 2006)). The conditional order here was clear that, should Larkin fail to produce the criminal court transcripts, his complaint would be dismissed, making it sufficiently specific to be enforceable. *Trabanco*, 81 A.D.3d at 491. But even absent his failure to comply with the conditional order, his behavior was willful and contumacious. *See Periphery Loungewear v. Kantron Roofing Corp.*, 214 A.D.2d 438 (1st Dep't 1995) (striking of answer warranted by defendant's failure to appear for deposition and violation of so-ordered stipulation); *Schneider v. City of New York*, 217 A.D.2d 610, 611 (2d Dep't 1995) ("A preliminary conference order is an order of the court and compliance with it should not be disregarded.").

As Supreme Court emphasized in its 2019 order denying the motion to vacate, Larkin failed to come forward with a reasonable excuse for his failure to comply, and his behavior instead confirmed that he was acting willfully. Larkin did not comply with Supreme Court's orders for several years after the court determined that production of the trial transcripts was Larkin's responsibility (R6-7). Larkin was thus given "ample opportunity" to comply but chose instead to ignore the court's orders. But instead of coming forward with a reasonable excuse for that failure, he repeatedly insisted that he should not have to produce the transcripts even after the issue had been resolved against him (*id.* at 1-2). That is the very definition of willful and contumacious conduct.

In any event, Larkin's arguments that he could not be required to comply with Supreme Court's order are meritless. At the time Supreme Court entered the conditional order, Larkin's only excuse for non-compliance was that the court purportedly lacked authority to require him to pay for and obtain the transcripts because the City was the party requesting them (*e.g.*, R11, 204). Larkin has now abandoned that contention on appeal, likely because it is wrong. This Court has in fact long held that the producing party may, and even should, be required to bear the costs of production. *See U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63 (1st Dep't 2012) (holding that producing should bear initial costs of discovery, but courts may entertain applications party to shift fees); *Clarendon Nat'l Ins. Co. v. Atl. Risk Mgmt., Inc.*, 59 A.D.3d 284, 286 (1st Dep't 2009) ("We see no

reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests.").

Larkin has now shifted to the argument that he could not be expected to produce transcripts he did not possess (App. Br. 11-12). But that argument first appears in the record for the first time in Larkin's 2016 motion to vacate, and if Larkin objected to the court's 2011 and 2014 discovery orders on that ground, he should have informed the court at that point. In any event, the cases Larkin cites do not establish that proposition, and establishing such a rule would not make sense.

Indeed, in several of the cases Larkin cites, the courts simply held that a party's failure to comply with a single discovery order was not willful and contumacious where the parties had made diligent efforts to obtain the evidence, or a diligent search for it. *See Byrne v. City of N.Y.*, 301 A.D.2d 489, 490 (2d Dep't 2003) (inability to identify all security personnel involved in incident not willful or contumacious where party substantially complied with the demand, provided detailed affidavits swearing that the party had conducted three more unsuccessful searches, and offered to assist in further efforts to obtain information); *LaManna v. MJ Cahn Woolen Co.,* 249 A.D.2d 451, 452 (2d Dep't 1998) ("[B]ecause the plaintiff is not in possession of the transcript at issue, despite her reasonable diligence in attempting to obtain it, the plaintiff has not exhibited a contumacious or willful disregard of the court order."); *Citibank N.A. v. Johnson*, 206 A.D.2d 942, 942 (4th Dep't 1994) ("[A]n officer of plaintiff stated that plaintiff had made a diligent search of its files and had provided defendant with all the requested documents that it

possessed."). They did not hold that Supreme Court could not require one of the parties to produce transcripts.

Moreover, Larkin made no such showing of diligence here. Only once, in a 2012 response to the City's Demand for Discovery and Inspection, did Larkin indicate that he intended to comply with the discovery order at all (R372). At no point in the ensuing 9 years did he provide further evidence of attempted compliance or show that he had made or intended to make a diligent effort to comply with the court's orders. Indeed, after his initial discovery disclosure in 2007 of the transcript excerpts already in his possession, Larkin provided no further materials from his criminal trial to the City.

In the other cases Larkin cites, the courts found that a party's failure to comply with discovery orders was not willful or contumacious where they showed that requested documents or information either did not exist or was not in their possession. *Bivona v. Trump Marina Hotel Resort*, 11 A.D.3d 574 (2d Dep't 2004); *Gatz v. Layburn*, 9 A.D.3d 348, 350 (2d Dep't 2004); *Bach v. City of N.Y.*, 304 A.D.2d 686, 687 (2d Dep't 2003); *Romeo v. City of N.Y.*, 261 A.D.2d 379, 380 (2d Dep't 1999); *cf. Vaz v. New York City Trans. Auth.*, 85 A.D.3d 902, 903 (2d Dep't 2011) (reiterating that a party could not be sanctioned for failing to produce information that it did not possess). For example, in *Gatz*, the court held that a plaintiff in an automobile accident case could not be sanctioned for failing to produce a police investigation report that he did not possess. *See Gatz*, 9 A.D.3d at 350.

But requiring Larkin to provide transcripts of his criminal trials is not comparable. Unlike the plaintiff in *Gatz*, who likely did not have had access to police investigation reports, Larkin should have been in possession of the transcripts of his criminal trials, and if he was not, he could obtain them by ordering them. Moreover, because the transcripts of the trials were critical to Larkin's malicious prosecution claim, one of the parties needed to produce them. Larkin has cited no authority for the proposition that Supreme Court could not order him to do so, especially considering that he was the one bringing a malicious prosecution claim, and the transcripts would be critical to his own case.

This case is thus much more like cases in which the parties failed to comply with repeated discovery orders. Where this Court has considered similar fact patterns, it has consistently held that dismissal was appropriate. *See Harris v. Kay,* 168 A.D.3d 419, 419 (1st Dep't 2019) (upholding Supreme Court's dismissal due to "plaintiff's repeated, willful and contumacious refusals to provide discovery and to comply with the court's orders over an approximately eight-year period"); *Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217, 217 (1st Dep't 2004) (upholding *sua sponte* dismissal of plaintiff's complaint where "[p]laintiff's year-long pattern of noncompliance with the court's repeated compliance conference orders gave rise to an inference of willful and contumacious conduct"); *Macias v. New York City Transit Auth.*, 240 A.D.2d 196 (1st Dep't 1997) (upholding *sua sponte* dismissal of plaintiff's case, which was ten years old at the time, when plaintiff failed to comply with a preliminary conference order requiring her appearance at a deposition).

In his brief, Larkin insists that reliance on *Goldstein* and *Macias* is inappropriate here because those cases involved willful or contumacious conduct and this case does not (App. Br. 14-15). This, of course, begs the question of whether Larkin's conduct was willful and contumacious which, as demonstrated, it was. Furthermore, Larkin's attempts to distinguish those cases factually are unpersuasive. He claims that *Goldstein* is not on point because that case involved "repeated warnings of the possibility of dismissal" while this case involved only one, and because the plaintiff in *Goldstein* failed to challenge the dismissal in a subsequent motion to vacate, while Larkin did (App. Br. 17). Neither of these factual distinctions make *Goldstein* inapplicable here. Larkin, like the plaintiff in *Goldstein*, was on notice that noncompliance would result in dismissal. Further, that Larkin challenged the conditional order of dismissal does not mean that the Court could not reject that challenge, which it did.

Larkin's attempt to dismiss *Macias*' relevance is similarly unpersuasive as it depends on the assertion that, while the plaintiff in *Macias*' acted willfully in failing to comply with court orders, the record in this case "is clear that [Larkin's] conduct was not willful." In addition to being wholly conclusory, this is, as discussed above, simply untrue.

C. Larkin's remaining contentions lack merit

Larkin makes two additional arguments in opposition to dismissal, neither of which is persuasive. First, he argues that his submission of an Affidavit of Merit (R21) with his motion to vacate the November 2014 order excuses his noncompliance (App.

Br. 14). But this argument appears to misunderstand the affidavit of merit referred to in CPLR 5015(a)(1). That is an affidavit that there is merit to Larkin's claim, not that his legal challenge to Supreme Court's discovery orders had merit. *See Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512. Larkin does not appear to have submitted such an affidavit, and even if he had, he would still need to provide a reasonable excuse. *See* CPLR 5015(a)(1). He has not.

The second argument is Larkin's claim that Supreme Court's February 2019 order restoring his case to the pretrial calendar is "the law of the case" (App. Br. 15). The "law of the case" doctrine holds that a court's determination of a question of law in a given case is binding not only on the parties, but on all other judges of coordinate jurisdiction. *State Higher Educ. Services Corp. v. Starr*, 158 A.D.2d 771, 772 (3d Dep't 1990). Larkin contends that Supreme Court's decision to restore his case to the pretrial calendar was a legal determination subject to the law of the case doctrine. But Larkin fails to explain the applicability of the law of the case doctrine, which does not appear to have any relevance here. In restoring the case to the pretrial calendar, the court did not resolve any issue in Larkin's favor, and in fact subsequently denied the attendant motion to vacate. That the City did not appeal Supreme Court's decision to re-calendar the case does not somehow prevent it from defending the court's subsequent decision, which as the City has already shown, was entirely proper.

CONCLUSION

For the foregoing reasons, the Supreme Court's order denying Larkin's motion to vacate the automatic dismissal of his complaint should be affirmed.

Applicant Details

First Name	**Seth**
Last Name	**Rosenberg**
Citizenship Status	**U. S. Citizen**
Email Address	**srosen29@binghamton.edu**
Address	**Address** Street **4200 Ludlow Street, Apartment 411** City **Philadelphia** State/Territory **Pennsylvania** Zip **19104** Country **United States**
Contact Phone Number	**6469327391**

Applicant Education

BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**June 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Asian Law Review** **University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Other**
Other Bar Admission(s)	**Not currently admitted to the bar.**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Burbank, Stephen
sburbank@law.upenn.edu
(215) 898-7072
Wolff, Tobias
twolff@law.upenn.edu
215-898-7471
Struve, Catherine
cstruve@law.upenn.edu
215-898-7068

References

Allison K. Hoffman
Professor of Law
University of Pennsylvania Law School
Email: ahoffman@law.upenn.edu
Telephone: 215-898-8631

Christopher D. Kercher
Partner
Quinn Emanuel Urquhart & Sullivan, LLP
Email: christopherkercher@quinnemanuel.com
Telephone: +1 212-849-7263

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Seth Rosenberg
4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

February 8, 2021

The Honorable John D. Bates
United States District Court
District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, District of Columbia 20001 United States

Dear Judge Bates:

I am writing to request your consideration of my application for a clerkship beginning in August of 2022. I am a third-year law student at the University of Pennsylvania. I would like to expand my legal network after completing my legal education in Philadelphia and accepting an employment offer with Quinn Emanuel Urquhart & Sullivan, LLP in their New York office; additionally, I have close familial ties to Rockville, Maryland and would prefer to live in an area with a sizable Jewish population. As a result, a clerkship in Washington, DC is ideal for me.

During law school, I have developed a passion for civil procedure and interdisciplinary approaches to the law. As a research assistant for Professor Stephen Burbank, I honed my skills of conducting legal research, synthesizing material from multiple legal sources and academic disciplines, and providing analysis with clear conclusions. In that role, my research contributed to an article by Professor Burbank studying trends in the certification of class actions. I built on that experience as Professor Burbank's teaching assistant for Civil Procedure. This semester, I am refining my research and writing skills through an independent research project with Professor Elizabeth Pollman, the topic being decentralized autonomous organizations ("DAOs") and their potential to disrupt current frameworks of corporate governance, structure, and formation.

I enclose my resume, law school transcript, undergraduate transcript, and writing sample. Letters of recommendation from Professor Stephen B. Burbank (sburbank@law.upenn.edu, 508-246-8674), Professor Tobias Barrington Wolff (twolff@law.upenn.edu, 215-898-7471), and Professor Catherine T. Struve (cstruve@law.upenn.edu, 215-898-7068) are also included. Please let me know if any other information would be useful in your assessment of my application.

Thank you for your consideration.

Respectfully,

Seth Rosenberg

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA
J.D. Candidate, May 2022
Honors: Dean's Prize, awarded to students obtaining the highest grades in the 1L year
University of Pennsylvania Law Review, Senior Editor
Asian Law Review, Associate Editor

Activities: Jewish Law Students Association, Board Member
Disabled & Allied Law Students Association, Founding Board Member
Penn Blockchain Association, Vice President
Teaching Assistant, Civil Procedure
Host, Law Review Online Podcast

THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, Binghamton, NY
B.A., *summa cum laude*, Philosophy, Politics, and Law, June 2018
Honors: Phi Beta Kappa
Activities: The Pipe Dream, Staff Writer
Critical Thinking Lab, Consultant

EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York May 2021-August 2021
Summer Associate (offer extended)

- Performed legal research and writing for securities litigation matters and Section 230 claim.
- Researched and summarized various new avenues of business, specifically areas of potential litigation in the future, with a particular focus on issues related to cryptocurrency mining.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania May 2020-September 2020
Research Assistant for Professor Stephen Burbank

- Researched the relationship between the Supreme Court and other federal courts, with a focus on the Courts of Appeals.

Research Assistant for Professor Tobias Barrington Wolff

- Researched the enforcement of injunctions by a federal district court different from the one that issued the injunction.

KAPLAN TEST PREP, Valley Stream, New York February 2019-July 2019
LSAT Instructor

- Through rehearsed lectures, and the administration of practice tests, ensured students were prepared for exam day.

WILLIAMS & CONNOLLY LLP, Washington, DC June 2018 - December 2018
Paralegal I

- Reviewed and categorized documents for use as deposition exhibits; assembled materials for client interviews and court appearances and facilitated litigation-related communications.

NEW YORK CITY CRIMINAL COURT, BRONX COUNTY, New York, New York June 2016 – July 2016
Judicial Intern to the Honorable Judge Anne Scherzer

- Observed several court cases; learned the process behind cross-examination, court proceedings, and general court etiquette.

THE CANDY AND COSMETIC DEPOT, Far Rockaway, New York Summers 2014 and 2016
Operations and Logistics Analyst

- Priced, listed, and packaged hundreds of items over the course of two summers and checked and maintained inventory.

INTERESTS

- Swimming, reading John Steinbeck, perfecting my turkey sandwich recipe.

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

LAW SCHOOL TRANSCRIPT

Fall 2019		**LAW**			
LAW	500	Civil Procedure (Burbank) - Sec 2	4.00	SH	A+
LAW	502	Contracts (Katz) - Sec 2A	4.00	SH	A
LAW	504	Torts (Hoffman,A) - Sec 2	4.00	SH	A
LAW	510	Legal Practice Skills (Govan) - Sec 2A	4.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Berman) - Sec	4.00	SH	CR
LAW	503	Criminal Law (Heaton) - Sec 2A	4.00	SH	CR
LAW	510	Legal Practice Skills (Govan) - Sec 2A	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
LAW	583	Judicial Decision-Making (Scirica)	3.00	SH	CR
LAW	598	Financial Regulation (Sarin)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Summer 2020		**LAW**			
LAW	855	Law Meets M&A Bootcamp Competition	2.00	SH	CR
		Term Statistics:	2.00	SH	
		Cumulative:	34.00	SH	
Fall 2020		**LAW**			
GAFL	611	STATS FOR PUBLIC POLICY	3.00	SH	P
GAFL	621	PUBLIC ECONOMICS	3.00	SH	P
LAW	508	Property (Parchomovsky)	3.00	SH	A-
LAW	602	Employee Benefits (Lichtenstein/Zimmerman)	2.00	SH	A-
LAW	802	Law Review - Associate Editor	(1.00)	SH	NR
LAW	832	Asian Law Review - Associate			

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                Editor                    (0.00) SH   CR
   LAW    999   Teaching Assistant (Burbank)
                                           2.00  SH   CR
   LAW    999   Research Assistant (Wolff)
                                           1.00  SH   CR
                   Term Statistics:       14.00  SH
                        Cumulative:       48.00  SH
Spring 2021      LAW
   GAFL   651   Public Finance and Public Policy
                                           3.00 SH   A
   GAFL   732   Public Management and Leadership
                                           3.00 SH   A
   LAW    638   Federal Courts (Struve)    4.00  SH  A-
   LAW    802   Law Review - Associate Editor
                                           0.00 SH   CR
   LAW    832   Asian Law Review - Associate
                Editor                     1.00  SH  CR
   LAW    999   Independent Study (Wolff)
                                           3.00 SH   A-
                   Term Statistics:       14.00  SH
                        Cumulative:       63.00  SH

Fall 2021        LAW
   LAW    555   Professional Responsibility
                (Hickok)                   2.00  SH   A+
   LAW    622   Corporations (Pollman)- Sec 2
                                           4.00  SH   A-
   LAW    650   Civil Practice Clinic Tutorial
                (Rulli)                    2.00  SH   A-
   LAW    652   Civil Practice Clinic: Fieldwork
                (Rulli)                    4.00  SH   A-
                   Term Statistics:       12.00  SH
                        Cumulative:       75.00  SH

Spring 2022      LAW
   LAW    560   Lawyering and Technology (Wolson)
                                          (2.00) SH   NR
   LAW    608   Blockchain and the Law (Tosato)
                                          (3.00) SH   NR
   LAW    631   Evidence (Rudovsky)       (4.00) SH   NR
   LAW    999   Independent Study (Pollman)
                                          (3.00) SH   NR
                   Term Statistics:        0.00  SH
                        Cumulative:       75.00  SH


* * * * * * * * * * * *COMMENTS* * * * * * * * * *
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The Law School adopted a mandatory Credit/Fail grading system for full-semester courses in Spring 2020 in response to the COVID-19 crisis.

DEAN'S PRIZE, awarded to the students attaining the highest grade point averages for the work of the first year;

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020

*** * * * * * * NO ENTRIES BEYOND THIS POINT * * * * * * * ***

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Issued To: SETH ROSENBERG
859 CRESTVIEW AVE
REFNUM:59861640
VALLEY STREAM, NY 11581-3117

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

Course Level: Undergraduate
First Admit: Fall 2014
Last Admit: Fall 2015

Current Program
Bachelor of Arts
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law

Degree Awarded Bachelor of Arts 20-MAY-2018
Primary Degree
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
201590		Advanced Placement EXM				
CHEM	101	Intro To Chemistry I	4.00	T		
ECON	162	Principles Of Macroeconomics	4.00	T		
HIST	1XX	1XX Level Course	4.00	T		
HUM	XXX	Humanities Elective	4.00	T		
MATH	1XX	100+ Level Course	4.00	T		
MATH	221	Calculus I	4.00	T		
PLSC	111	Intro To Amer Politics	4.00	T		
SOCS	XXX	Social Science Elective	4.00	T		
Ehrs: 32.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2015						
UG Harpur						
BA Philosophy Politics and Law						
AAAS	284B	Modern India 1757-2000	4.00	A	16.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
PHIL	107	Existence and Freedom (LEC)	4.00	A	16.00	
PSYC	111	General Psychology	4.00	A	16.00	
WRIT	111	Coming to Voice	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	103A	Foundations Of America (LEC)	4.00	A	16.00	
HIST	225	Imperial Russia	4.00	A	16.00	
PHIL	140	Intro To Ethics	4.00	A	16.00	
THEA	102	Introduction To Theater	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Fall 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	325	Red Phoenix: Revolution & USSR	4.00	A-	14.80	
PHIL	146	Law & Justice (LEC)	4.00	A-	14.80	
PHIL	147	Markets, Ethics And Law (LEC)	4.00	A	16.00	
PLSC	340	Public Opinion	4.00	A-	14.80	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.40 GPA: 3.77						
Dean's List						
Good Standing						
Spring 2017						
UG Harpur						
BA Philosophy Politics and Law						
ASTR	114	Sun, Stars And Galaxies	4.00	A	16.00	
ASTR	115	Observational Astronomy Lab	1.00	A	4.00	
HIST	374	China In The 20th Century	4.00	A	16.00	
PHIL	345	Philosophy Of Law	4.00	A	16.00	
PLSC	323	Congress In Amer Politics	4.00	A-	14.80	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 66.80 GPA: 3.92						
Dean's List						
Good Standing						
********** CONTINUED ON PAGE 2 **********						

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

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Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2017						
UG Harpur						
BA Philosophy Politics and Law						
HIST	380D	Global Early American Republic	4.00	A	16.00	
HWS	210	Men's Personal Wellness	4.00	A	16.00	
PHIL	456C	Justice and Gender	4.00	A	16.00	
PHIL	497	Critical Thinking Pedagogy	1.00	A	4.00	
PLSC	389W	Political Parties	4.00	A	16.00	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 68.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2018						
UG Harpur						
BA Philosophy Politics and Law						
ENG	360R	Romanticism	4.00	A	16.00	
HWS	110	Taekwondo	2.00	A	8.00	
PSYC	391	Practicum In College Teaching	4.00	P	0.00	
THEA	391	Practicum In College Teach I	4.00	A	16.00	
Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 40.00 GPA: 4.00						
Good Standing						
Last Standing: Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	96.00	92.00	363.20	3.94
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	128.00	92.00	363.20	3.94

********** END OF TRANSCRIPT **********

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

WRITING SAMPLE

The attached writing sample is a ten-page excerpt of a memorandum that I drafted as a research assistant for Stephen Burbank, the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. I performed all the research, and this work is entirely my own.

Memorandum

To: Stephen B. Burbank

From**:** Seth Rosenberg

Date: July 27, 2020

Re: Literature Review

I. Focus of Memo

This memo identifies and discusses scholarship concerning the mechanisms of legal change when comparing the U.S. Supreme Court and the Federal Courts of Appeal. One partial aim of the research conducted for this memo is to assess who the true first movers are when it comes to legal change, or, in other words, which part of the judicial hierarchy is doing the leading, and which part is doing the following. It has been said that the Supreme Court is never too far ahead of public opinion.[1] Instead of addressing questions related to the Supreme Court's responsiveness to the broader populace, this memo addresses slightly different questions: Is the Supreme Court ever too far ahead of the lower courts? Or, alternatively, are the lower courts ever too far ahead of the Supreme Court?

II. Sources of Legal Change

a. The Scholarly Landscape – A Summary

I found some articles that directly focused on legal change,[2] and others that discussed the issue through a particular level of the judiciary.[3] Most articles that discussed legal change primarily focused on the Supreme Court.[4] I was, however, able to find articles that placed an

[1] *See, e.g.*, DEBORAH L. RHODE, LAWYERS AS LEADERS (2013).

[2] *See e.g.*, Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 U.C.L.A. Rev. 343, 345 (1998) ("One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change."); Douglas Rice, *The Impact of Supreme Court Activity on the Judicial Agenda*, 48 LAW & SOC'Y REV. 63 (2014) ("I find evidence in both trial and appellate courts that Supreme Court attention to policy areas subsequently leads to *fewer* cases being heard and decided in those policy areas in the lower courts. Yet I also find evidence of additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue.").

[3] *See, e.g.*, Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 596 (2017) ("In this Article, we consider the more basic question of lower court adherence to precedent. We address this principally by analyzing U.S. district court judges' treatment of precedents from the Supreme Court and courts of appeals across an eighty-year span.")

[4] *See, e.g.*, Bethany J. Ring, Comment, *Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality*, 23 CHAP. L. REV. 205 (forthcoming Winter 2020). Other authors focused on the Supreme Court but did not ignore the limits the Court faces in changing the law. *See* Baxter, *supra* note 2, at 345 ("Given the

emphasis on the lower courts.[5] Not all authors were confident in their analysis of legal change,[6] which suggests further study in this area is warranted. One article had shades of normativism,[7] and seemed to argue that regardless of whether the lower courts *do* affect legal change, it is their role to do so and, therefore, they *should* affect legal change.[8]

b. The Importance of the Lower Courts in Studying Legal Change

Even if the data demonstrates that the Supreme Court affects legal change, the lower courts will still be doing most of the legwork. So, studies of the Supreme Court's ability to change the law are incomplete without accounting for how the lower courts respond to the Court's actions.[9] It is important to gauge the extent that the Court affects the agenda of the lower courts, because if such an influence is found, then "the Court shapes both policy and lower court opportunities for compliance with the Court's preferences on that policy."[10] A more subtle way the Court can affect the issues dealt with by the lower courts is through the effects the Court has on litigants. When the Court speaks, others listen, and adapt.[11] The types of litigants primarily interested in individual success might be replaced by others primarily interested in moving public policy.[12] The Court's actions alter "the attention the federal courts devote to [an issue] and thus the influence the judiciary has on that issue, in subsequent years."[13]

Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention.").

[5] For example, one article assessed the role, over time, that the lower courts have played in the development of the law and concluded that "today's district court judges play a far less active role in shaping the law than their predecessors did." Devins & Klein, *supra* note 3, at 597.

[6] One author found mixed evidence of Supreme Court influence. *See* Rice, *supra* note 2, at 64 (finding that, in some policy areas, once the Supreme Court addressed an issue it led to "fewer cases being heard and decided in those policy areas in the lower courts," but also finding "evidence of . . . additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue").

[7] For a more detailed description of normative arguments, see Adam J. Kobler, *How to Fix Legal Scholarmush*, 95 IND. L.J. 1191, 1196 ("Descriptive claims address the way the world is, was, or will be. . . . Normative claims, by contrast, speak to how the world ought to be.").

[8] *See* Devins & Klein, *supra* note 3, at 599 ("[T]he doctrine of dicta compels the judge deciding a case to make her "own decision.").

[9] Ring, *supra* note 4, at 208 ("[T]o understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required . . . [otherwise,] unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining [the literature] . . . .").

[10] Rice, *supra* note 2, at 63.

[11] *Id.* at 64. ("The Court's attention shifts the very participation of certain actors seeking to influence public policy in the federal courts, as issue areas go from being characterized by broad-based litigation to being characterized by less litigation, but more sophisticated participants.")

[12] *Id.*

[13] *Id.* at 65.

c. The Mechanisms of Legal Change

Just as authors utilizing a complexity approach spoke in terms of an equilibrium,[14] some authors did the same when adopting a framework to evaluate legal change.[15] The displacement of entrenched aspects of legal regimes creates an influx of complexity, and, as discomfort with newly ambiguous areas of the law permeates throughout the legal system, it sets "off a search for more determinate rules."[16] One way to study the mad dash that follows changes to prior understandings of law, is to focus on the questions that surround the fate of past cases decided under now-changed legal frameworks.[17] "Transitional moments"[18] in the law are not created equally: the more a change in the law implicates a "potential to unsettle the outcome of an enormous number of already decided cases,"[19] the more difficult the transitional period will be.

However, not every change in the law is necessarily destabilizing.[20] The degree of impact a legal change will have on the overall system is dependent on the context of the attempted change and whether these changes apply retroactively or prospectively. For example, grandfathering provisions, which provide that activities "initiated under an old rule will continue to be governed by that rule," are an example of some of the tools that can be "used to limit the impact of a legal change."[21] Other than the latter tools, external actors affected by legal change can make

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[14] *See, e.g.,* Doni Gewirtzman, *Lower Court Constitutionalism,* 61 AM. U.L. REV. 457, 499, 503 n. 243 (2012) ("Systems theorists often measure a system's performance by looking at the systems' resilience and adaptive capacity: its ability to survive, adjust, and thrive in a changing environment."); J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1388 (2011) (defining the adaptive capacity of legal systems as "the system's ability to respond to "threats to system equilibrium … by changing resilience strategies without changing fundamental attributes of the system").

[15] *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Equilibrium theory provides a framework for evaluating legal change as a function of the legal context into which that change is introduced."); Hathaway, *supra* note 27, at 606, 609 (arguing that "[t]he doctrine of stare decisis . . creates an explicitly path-dependent process," and that when assessed as an "increasing returns" path dependent process, we should expect the law to produce "multiple [possible] equilibria"); Kastellec, *The Judicial Hierarchy: A Review Essay, supra* note 5, at 10 ("In equilibrium, the Supreme Court is most likely to review cases from the side of the conflict it eventually rules against, because these cases are most informative.").

[16] *Id.* at 740.

[17] Toby J. Heytens, *The Framework of Legal Change*, 97 CORNELL L. REV. 595, 595-96 (2012) ("[T]he same basic question arises again and again: What should we do about all those other cases that courts have already resolved using legal principles that were subsequently tweaked, overhauled, or rejected? In a previous article, I called situations raising that question 'transitional moments.'").

[18] *Id.*

[19] *Id.*

[20] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Adoption of a new legal rule can, but need not, constitute a destabilizing influence on the underlying legal structure. Equilibrium theory thus provides a tool for judging stability within the legal system.").

[21] *Id.* at 1067.

impactful change more difficult, if only because it can be hard to fully predict how such actors will respond to legal change. For example, as social workers become more involved with divorce proceedings, the role of social workers and the tenor of divorce proceedings have changed concurrently.[22] A separate but related issue is the possibility that external actors fail to respond to legal change at all. The potential for the law to affect societal change has it limits.[23] And while the source cited in the latter footnote focused on the economy, and not the judiciary, it at least appears intuitively correct that the Supreme Court's attempts at legal change would butt heads with deep-rooted norms in the lower courts in ways that would lessen the Court's overall impact.

Legal change is most likely to occur where the law is indeterminate. This is because judges are unlikely to change the law where it is settled and clear, or at least this is the expectation. Confusion in the law is where legal scholars can assist lower courts left without guidance,[24] but unfortunately, "[s]cholars currently lack a concrete theory of how courts should proceed in such situations."[25] Worse still, the solutions offered to the Supreme Court's unstable approach to statutory interpretation seem to imply that any consistent approach is better than no consistency at all, that uniformity and simplicity are *per se* virtues for the Court when they make changes to the law.[26] In deciding how to change the law, and when, the Court must "negotiate the trade-off between the institutional and epistemic benefits of formal law and the costs of applying flawed tests."[27]

To fully flesh out the above discussion of legal indeterminacy, it is necessary to see how and why such gaps in the law develop. The Court's decision to change the law, and the extent that

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[22] Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 743-744 (1988) ("As the formal role of social workers evolved, so did their ideology and rhetoric. Consistent throughout the evolution of social workers' involvement with divorce, however, has been their perception that their appropriate function is to make divorce as conflict-free as possible, or at least to manage the conflict appropriately.")

[23] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-stakeholder Divide*, 36 IOWA J. CORP. L. 59, 111 (2010) ("[T]here is reason to doubt that legal change alone will lead to structural or institutional change in the actors and relationships that are entrenched in the economy.").

[24] Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 594 (2018) (arguing that the way the Courts have dealt with the scope of the Fourth Amendment is one example of what the author terms a "legal blank slate," because "formal law is essentially silent on the issue, yet judges are compelled to set some standards to guide future courts and other legal actors, [and thus,] [c]ourts seeking to move beyond the confusion of current Fourth Amendment law are left with a blank slate.").

[25] *Id.* at 591.

[26] *Id.* at 211-12 ("The explicit premise of much of this work is that 'often it is not as important to choose the best convention as it is to choose one convention and stick to it.' I refer to this trend toward simplification and uniformity as "the dumbing down of statutory interpretation.") (footnote omitted).

[27] Tokson, *Blank Slates*, *supra* note 196, at 596.

they can succeed in this effort, is a pendulum that swings from hyperactivity to complete silence. This dynamic occurs over the course of decades, and, despite the fact that this often leaves the lower courts without guidance for long stretches at a time, the lower courts are still tasked with developing the law in these areas.[28] Sometimes the confusions produced by Supreme Court decisions are accidental, but that does not mean the Court is quick to correct the unintended consequences of its decisions.[29] However, it is hard to believe the Court is entirely innocent when changes in the law develop after a decision is issued.[30]

One manifestation of the Court's varying level of activity in addressing gaps in the law are intercircuit splits. The resolution of intercircuit splits is "responsible for the lion's share of legal development in federal courts."[31] Although splits create difficulties for the judicial system, the resource constraints imposed on the Court make splits somewhat unavoidable. This is because "the Supreme Court depends crucially on litigation in lower courts to yield information about the relationship between legal rules and outcomes in the real world."[32] In other words, one can think of legal changes as hypotheses put forth by the Supreme Court and the responses of the lower courts as the data necessary to assess those hypotheses. The Court benefits from leaving an area of the law untouched for long stretches of time because allowing the lower courts to develop the

[28] *See, e.g.*, Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727, 741 (1999) ("While the Supreme Court has taken a noticeable hiatus from section 7 jurisprudence, the lower courts and the enforcement agencies have continued to refine the process of merger analysis."); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 384 (2020) ("During the Court's jurisdictional *hiatus*, the *lower courts* developed and applied a framework for adjudicative authority constructed, to the extent possible, from the *Supreme Court*'s binding pronouncements. This undertaking was not [easy,] predominantly due to the Supreme Court's avoidance of--or inability to resolve--several foundational jurisdictional issues.")

[29] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 435 ("[The] *Marks* 'narrowest ground' doctrine has failed to accurately predict the outcome of future Supreme Court decisions. This failure can lead to discontinuity and uncertainty regarding important legal principles because of the break between prior interpretations of Supreme Court decisions by lower federal courts and the Supreme Court's later, conflicting resolution."). One author succinctly described the mechanism for how accidental legal change occurs. *See* Hasen, *supra* note 25, at 792 ("Inadvertence occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice's values.").

[30] One author, discussing various ways Supreme Court Justices move the law, was less equivocal. *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781-82 (2012) ("[P]erhaps the most common reason that a Justice will vote to hear a case will be to make some change in existing law.")

[31] Beim & Rader, *supra* note 25, at 450.

[32] Clark & Kastellec, *supra* note 8, at 152.

law gives the Supreme Court a far more extensive record of the effects of attempted changes to the law. Additionally, more eyes should infuse more creativity into the law.

The resolution of intercircuit splits—and by extension the decision to change the law—is a tradeoff. The Court must choose between the costs associated with leaving splits unresolved[33] on the one hand, and the informational benefits received from "allowing other lower courts to make their own independent judgments,"[34] on the other. When the Court resolves a split, "[i]t chooses to forego the additional information it might glean from allowing the legal question to further play out in the lower courts."[35] At the same time, however, resolution of intercircuit splits "swiftly eliminates the lack of uniformity in the law created by the conflict, by settling the issue."[36] Multiple models of the Court's behavior with regard to circuit splits indicate that "the Court should be more likely to end a conflict immediately . . . when a conflict emerges after several lower courts have already weighed in on a new legal issue."[37]

Although when resolving intercircuit splits, and by extension affecting legal change, the Court tends "to join the [position taken by a] majority of circuits,"[38] sometimes the Court disregards widespread views in the lower courts.[39] Thinking of the judicial process as a dialectic might help explain why the latter occurs.[40] If we view interactions between the Supreme Court

[33] *Id.* (discussing how *United States v. Booker*, 543 U.S. 220 (2005), "which ruled that federal district court judges were to treat the U.S. sentencing guidelines as advisory rather than mandatory," caused an intercircuit split, which effectively meant that "defendants with similar cases faced different standards of appellate review of their sentences, depending on where they committed their crimes").
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 10. *See also* Beim & Rader, *supra* note 25, at 449 ("'Well-percolated' splits . . . are no more likely to be resolved by the Supreme Court. The likelihood of resolution does not increase as more cases arise in a split.")
[38] Clark & Kastellec, *supra* note 8, at 152. *See also* Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 9 ("[W]hen the justices review circuit conflicts, they are more likely to come down on the side of the issue that was favored by a majority of the circuits, suggesting that the justices are engaging in vertical learning.").
[39] *See, e.g.*, Heytens, *The Framework of Legal Change*, *supra* note 188, at 597 ("Until 2009, the widespread view in the lower courts was that a police officer who had lawfully arrested [drivers,] could, without need for any further justification, search the entire passenger compartment of the vehicle. In *Arizona v. Gant*, [556 U.S. 332 (2009),] however, the Supreme Court rejected that position . . . ."). The same author went on to point out that *Gant* is not the first time "the Supreme Court changed the law in a way that threatened to call into question a great many previous convictions and sentences. The Warren-era Court, of course, did that sort of thing all the time. But the Rehnquist-era Court did it quite a few times too . . . ." *Id.* 603.
[40] *See, e.g.* Siegel, *supra* note 18, at 1187 ("The dialectical, side-by-side model of judicial interactions developed in this Article is distinct from approaches that emphasize either top-down hierarchy or bottom-up resistance or percolation.").

and the lower courts as a conversation, then this phenomenon makes more sense. Under this view, the federal courts are "a system in which lines of communication and influence can run back and forth, not just down."[41] When the Court speaks, it has the final say in this conversation, but the lower courts still retain a powerful voice. So, it makes sense that, as in any conversation between a superior and a subordinate with valued opinions, the Court, in resolving splits, sometimes listens to the majority of circuits, and other times appears to flout them.

The dynamic between the Court and the lower courts is better described as an informational dialectic, as the Court and the lower courts are not truly "talking." This dialectic begins when the Court establishes precedent with "a degree of uncertainty regarding how these precedents will actually play out . "[42] Then, as the lower courts implement that precedent, the ideological nature of that implementation, provides "information to [the Supreme Court] about the implications of the precedent as it is applied to contemporary disputes."[43] Lastly, the Court then uses "this information to correct its body of precedent."[44] Where the Court has not put forth firm precedent, such as with a plurality decision, the lower courts have a greater role in this dialectic.[45] One major caveat to this discussion is that while reasoning from lower court opinions should benefit the Supreme Court, "it is unclear whether that reasoning actually reaches the Supreme Court."[46]

While the above discussion of the mechanisms of legal change is important, it is equally valuable to assess the multiple options available to the Court when it seeks to change the law. One author argued that the problem with past scholarship on how the Supreme Court affects the lower courts is that it focuses on the "decision-making stage, but [ignores] the prior step in which cases actually arrive in lower courts."[47] The same author went on to argue that understanding whether the Supreme Court can and does manipulate "what is on the agenda of the lower federal courts . . . is crucial to understanding the decision-making process."[48] These comments suggest

[41] Siegel, *supra* note 18, at 1223-24.
[42] Hansford et al., *supra* note 7, at 894.
[43] *Id.* at 895.
[44] *Id.*
[45] *See* Marceau, *supra* note 148, at 975-76 ("Under the limited class of cases in which the Court applies Marks there is often substantial deference shown to lower court agreement as to the precedent flowing from a prior plurality.")
[46] Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction,* 74 OHIO ST. L.J. 423, 439 (2013).
[47] Rice, *supra* note 172, at 65.
[48] *Id.*

that there is still much to learn regarding the Supreme Court's ability to change the law.[49] However, there were some authors who at least catalogued the potential methods the Court can use to change the law. Some approaches to changing the law are direct: the Court can expressly try to change the law by overruling or extending precedent;[50] or alternatively, the Court can invite "litigants to argue for the overruling or extension of precedent."[51] Other methods are less direct, such as anticipatory overruling, where the Court signals that while precedent is safe for the moment, it may not fare much better in the future.[52] In the past anticipatory overruling were more overt, but recently "the Court has backed off such express anticipatory overrulings."[53] Related to the practice of anticipatory overruling is "stealth overruling,"[54] in which the Court functionally, but not explicitly, overrules an existing precedent. One way this can happen is through overly complex qualifications on the precedential value of an opinion or legal rule.[55] Still other methods of changing the law are hiding in plain sight: what one author described as "time bombs,"[56] or "seemingly offhand, throwaway phrases that [are then] exploited in later cases."[57]

Regardless of the Court's actual impact on the state of the law, there are built-in limits to the Court's influence. The Court constrains itself through both formal and informal "rules and norms

[49] *Id.* ("[W]e do not know whether and how the Supreme Court influences what lower federal courts discuss and decide. Yet history suggests influence does exist.").
[50] Hasen, *supra* note 25, at 782.
[51] *Id.* at 784.
[52] *Id.* at 783 (describing the Court's decision in Northwest Austin Municipal Utility District Number One v. Holder, 129 S. Ct. 2504 (2009), as "signaling that [the Court] would not be so charitable when reviewing the [constitutionality of section five of the Voting Rights Act] in the next case").
[53] *Id.* at 784. One author quoted Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), as an example of past anticipatory overrulings. This example serves as a useful reference point for how the Court has transitioned in its use of this tactic. *See id.* ("[T]he Court held that the Bankruptcy Act of 1978 was unconstitutional . . . [but] stayed its own ruling to give Congress 'an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of bankruptcy laws.'").
[54] Hasen, *supra* note 25, at 780 ("The Roberts Court also has engaged in 'stealth overruling.' Stealth overruling occurs when the Court does not explicitly overrule an existing precedent. Instead, it 'fails to extend a precedent to the conclusion mandated by its rationale,' or it 'reduces a precedent to nothing.'").
[55] *See, e.g.*, Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1535 (2008) (quoting an example of disingenuous judicial behavior, provided by legal scholar Karl Llewellyn, whereby a court distinguishes "a prior decision by declaring 'this rule holds only of redheaded Walpoles in pale magenta Buick cars.'") (footnote omitted).
[56] *Id.* at 789. (giving credit for the term to SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).
[57] *Id.* (quoting SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).

that govern the Court's own decision-making processes,"[58] and is additionally constrained by forces, such as losing litigants who do not seek appeal, that work to diminish "the occasions upon which the Court will have an opportunity to issue law-changing decisions."[59] Of particular relevance, when the Court attempts to move the law, it must account for the viability of faithful implementation in the lower courts.[60] Stare decisis is likely the most well-known limitation imposed on the Court. Because stare decisis is based "on the need for consistency, efficiency, [and] predictability,"[61] it acts as a judicial levee preventing a constant flood of legal change. Even though stare decisis can be circumvented by creatively distinguishing or reconciling precedent, such "creativity must be bounded by intellectual candor."[62] One author seemed to imply that the degree of faithfulness to stare decisis is a function of the Court's appetite for legal change.[63] Luckily, however, the Justices are not entirely free to change the law on a whim, as there are costs to legal change.[64]

The general requirement of reason-giving inherent to opinion writing is arguably heightened when considering attempted changes to the law. [65] While the latter is supposed to limit those Supreme Court Justices that are hungry for legal change, one author expressed concern that this intuitively heightened reason-giving requirement has been abandoned in an "insidious manner."[66] For example, in *Gonzales v. Carhart*,[67] "the Court upheld the constitutionality of a federal law prohibiting so-called 'partial birth abortions,' even though the Court had held a virtually identical state law unconstitutional seven years earlier . . . [but] offered no principled

[58] Baxter, *supra* note 119, at 346.
[59] *Id.* at 345.
[60] *See* Tokson, *Judicial Resistance and Legal Change*, *supra* note 25, at 967 ("In general, judicial resistance to doctrinal change may present another obstacle to the pursuit of meaningful social change via the courts.").
[61] Stone, *supra* note 229, at 1534.
[62] *Id.*
[63] *Id.* at 346.
[64] *See, e.g. id.* ("[O]verruling has costs for the prevailing majority – perhaps impaired relations with fellow Justices who would have adhered to the precedent, the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.").
[65] *See id.* ("[T]he Court is expected to provide reasoned explanations for its decisions. This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.") (footnotes omitted). One author normatively argued that even if one posits that there is not a heightened requirement for reason-giving, there ought to be one. *See* Stone, *supra* note 229, at 1534 ("[B]ecause the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.").
[66] Stone, *supra* note 229, at 1537-38 ("Their technique, which was perfectly anticipated and ridiculed by Karl Llewellyn, is to purport to respect a precedent while in fact cynically interpreting it into oblivion.").
[67] 127 S. Ct. 1610 (2007).

basis for ignoring the earlier decision."[68] The positions offered by Justices in recent situations where the Court has arguably perverted stare decisis are only supportable "if they were writing on a clean slate."[69] However, the Court is *not* writing on a clean slate, and so, when the Court functionally overrules precedent but does not own up to what it is doing, it is being dishonest. Such dishonesty is damaging to judicial integrity and confounding for the study of legal change.[70]

d. Notes for Future Scholarship in this Area of the Law

Supreme Court decisions need time to breathe before an adequate assessment of their impact is possible.[71] Unfortunately, "a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects."[72] Moreover, because it is in the Court's best interests not to draw attention to itself when acting with the potential for public backlash, scholars are alone sometimes in choosing cases which have already or will in the future produce legal change.[73] So even results that appear to demonstrate either the Court's failure to create legal change or a choice not to must be taken with a grain of salt, as the Court could be "stealth overruling."[74] The sometimes covert nature of legal change leads to misfires: scholars anticipate a certain case in the pipeline will effect momentous legal change, and then no such change occurs.[75] This demonstrates either that changes in the law are generally difficult to predict or that scholars do not yet fully understand how legal change occurs; thus, this is an area ripe for further study.

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[68] Stone, *supra* note 229, at 1538 (footnote omitted).
[69] *Id.*
[70] One author argued that "[t]he sad truth is that Roberts and Alito seem to have been driven by nothing more than their own desire to reach results they personally prefer . . . ." *Id.* Of course, the Court has not always been fully honest in its opinions, and so this is not a new phenomenon. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO L.J. 1, 4 (2010) ("Stealth overruling is assuredly not unique to the Roberts Court . . . the Warren Court, for example, did it as well . . . .").
[71] Ring, *supra* note 174, at 207 ("Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time.").
[72] *Id.*
[73] Hasen, *supra* note 25, at 780 ("Despite the Citizens United ruling, and maybe now more because of the public reaction to it, express overrulings of precedent are rare.").
[74] *Id.*
[75] *See* Ring, *supra* note 174, at 207 ("Because they operate as the final say, Supreme Court opinions are ofttimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.").

Applicant Details

First Name	**Seth**
Last Name	**Rosenberg**
Citizenship Status	**U. S. Citizen**
Email Address	**srosen29@binghamton.edu**
Address	**Address** Street **4200 Ludlow Street, Apartment 411** City **Philadelphia** State/Territory **Pennsylvania** Zip **19104** Country **United States**
Contact Phone Number	**6469327391**

Applicant Education

BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**June 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Asian Law Review** **University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Other**
Other Bar Admission(s)	**Not currently admitted to the bar.**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Struve, Catherine
cstruve@law.upenn.edu
215-898-7068
Wolff, Tobias
twolff@law.upenn.edu
215-898-7471
Burbank, Stephen
sburbank@law.upenn.edu
(215) 898-7072

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Seth Rosenberg
4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

May 12, 2021

The Honorable John D. Bates
United States District Court
District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, District of Columbia 20001 United States

Dear Judge Bates:

I am writing to request your consideration of my application for a clerkship beginning in September of 2024. I am a third-year law student at the University of Pennsylvania; next year I will be working at Quinn Emanuel Urquhart & Sullivan, LLP in their New York office. In 2023, I will be clerking for Judge Harris Hartz in the 10th Circuit. I am interested in building on my future clerkship experience while also expanding my legal network in the Northeast. I value being close to family, and my first cousins live in Rockville, Maryland; additionally, I would like to clerk in an area with a sizable Jewish community. As a result, a clerkship experience in Washington, DC is ideal for me.

During law school, I have developed a passion for trial litigation and interdisciplinary approaches to the law. As a research assistant for Professor Stephen Burbank, I honed my skills of conducting legal research, synthesizing material from multiple legal sources and academic disciplines, and providing analysis with clear conclusions. In that role, my research contributed to an article by Professor Burbank studying trends in the certification of class actions. This semester, I built on that experience through an independent research project, the topic being decentralized autonomous organizations ("DAOs") and their potential to disrupt current frameworks of corporate governance, structure, and formation.

I enclose my resume, law school transcript, undergraduate transcript, and writing sample. Letters of recommendation from Professor Stephen B. Burbank (sburbank@law.upenn.edu, 508-246-8674), Professor Tobias Barrington Wolff (twolff@law.upenn.edu, 215-898-7471), and Professor Catherine T. Struve (cstruve@law.upenn.edu, 215-898-7068) are also included. Please let me know if any other information would be useful in your assessment of my application.

Thank you for your consideration.

Respectfully,

Seth Rosenberg

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA
J.D. Candidate, May 2022
Honors: Dean's Prize, awarded to students obtaining the highest grades in the 1L year
University of Pennsylvania Law Review, Senior Editor
Asian Law Review, Associate Editor
Credited for research in Stephen Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 L. & CONTEMP. PROBS. 73, 73 (2021)

Activities: Jewish Law Students Association, Board Member
Disabled & Allied Law Students Association, Founding Board Member
Penn Blockchain Association, Vice President
Teaching Assistant, Civil Procedure
Host, Law Review Online Podcast

THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, Binghamton, NY
B.A., *summa cum laude*, Philosophy, Politics, and Law, June 2018
Honors: Phi Beta Kappa
Activities: The Pipe Dream, Staff Writer
Critical Thinking Lab, Consultant

EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York May 2021-August 2021
Summer Associate (offer extended)

- Performed legal research and writing for securities litigation matters and Section 230 claim.
- Researched and summarized various new avenues of business, specifically areas of potential litigation in the future, with a particular focus on issues related to cryptocurrency mining.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania May 2020-September 2020
Research Assistant for Professor Stephen Burbank

- Researched the relationship between the Supreme Court and other federal courts, with a focus on the Courts of Appeals.

Research Assistant for Professor Tobias Barrington Wolff

- Researched the enforcement of injunctions by a federal district court different from the one that issued the injunction.

KAPLAN TEST PREP, Valley Stream, New York February 2019-July 2019
LSAT Instructor

- Through rehearsed lectures, and the administration of practice tests, ensured students were prepared for exam day.

WILLIAMS & CONNOLLY LLP, Washington, DC June 2018 - December 2018
Paralegal I

- Reviewed and categorized documents for use as deposition exhibits; assembled materials for client interviews and court appearances and facilitated litigation-related communications.

NEW YORK CITY CRIMINAL COURT, BRONX COUNTY, New York, New York June 2016 – July 2016
Judicial Intern to the Honorable Judge Anne Scherzer

- Observed several court cases; learned the process behind cross-examination, court proceedings, and general court etiquette.

THE CANDY AND COSMETIC DEPOT, Far Rockaway, New York Summers 2014 and 2016
Operations and Logistics Analyst

- Priced, listed, and packaged hundreds of items over the course of two summers and checked and maintained inventory.

INTERESTS

- Swimming, reading John Steinbeck, meditation, chess, perfecting my turkey sandwich recipe.

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

LAW SCHOOL TRANSCRIPT

Fall 2019		**LAW**			
LAW	500	Civil Procedure (Burbank) - Sec 2	4.00	SH	A+
LAW	502	Contracts (Katz) - Sec 2A	4.00	SH	A
LAW	504	Torts (Hoffman,A) - Sec 2	4.00	SH	A
LAW	510	Legal Practice Skills (Govan) - Sec 2A	4.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Berman) - Sec	4.00	SH	CR
LAW	503	Criminal Law (Heaton) - Sec 2A	4.00	SH	CR
LAW	510	Legal Practice Skills (Govan) - Sec 2A	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Wigler)	(0.00)	SH	CR
LAW	583	Judicial Decision-Making (Scirica)	3.00	SH	CR
LAW	598	Financial Regulation (Sarin)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Summer 2020		**LAW**			
LAW	855	Law Meets M&A Bootcamp Competition	2.00	SH	CR
		Term Statistics:	2.00	SH	
		Cumulative:	34.00	SH	
Fall 2020		**LAW**			
GAFL	611	STATS FOR PUBLIC POLICY	3.00	SH	P
GAFL	621	PUBLIC ECONOMICS	3.00	SH	P
LAW	508	Property (Parchomovsky)	3.00	SH	A-
LAW	602	Employee Benefits (Lichtenstein/Zimmerman)	2.00	SH	A-
LAW	802	Law Review - Associate Editor	(1.00)	SH	NR
LAW	832	Asian Law Review - Associate			

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                Editor                    (0.00) SH   CR
   LAW    999   Teaching Assistant (Burbank)
                                           2.00  SH   CR
   LAW    999   Research Assistant (Wolff)
                                           1.00  SH   CR
                   Term Statistics:       14.00  SH
                        Cumulative:       48.00  SH
Spring 2021      LAW
   GAFL   651   Public Finance and Public Policy
                                           3.00 SH   A
   GAFL   732   Public Management and Leadership
                                           3.00 SH   A
   LAW    638   Federal Courts (Struve)    4.00  SH  A-
   LAW    802   Law Review - Associate Editor
                                           0.00 SH   CR
   LAW    832   Asian Law Review - Associate
                Editor                     1.00  SH  CR
   LAW    999   Independent Study (Wolff)
                                           3.00 SH   A-
                   Term Statistics:       14.00  SH
                        Cumulative:       63.00  SH

Fall 2021        LAW
   LAW    555   Professional Responsibility
                (Hickok)                   2.00  SH   A+
   LAW    622   Corporations (Pollman)- Sec 2
                                           4.00  SH   A-
   LAW    650   Civil Practice Clinic Tutorial
                (Rulli)                    2.00  SH   A-
   LAW    652   Civil Practice Clinic: Fieldwork
                (Rulli)                    4.00  SH   A-
                   Term Statistics:       12.00  SH
                        Cumulative:       75.00  SH

Spring 2022      LAW
   LAW    560   Lawyering and Technology (Wolson)
                                          (2.00) SH   NR
   LAW    608   Blockchain and the Law (Tosato)
                                          (3.00) SH   NR
   LAW    631   Evidence (Rudovsky)       (4.00) SH   NR
   LAW    999   Independent Study (Pollman)
                                          (3.00) SH   NR
                   Term Statistics:        0.00  SH
                        Cumulative:       75.00  SH


* * * * * * * * * * * *COMMENTS* * * * * * * * * *
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The Law School adopted a mandatory Credit/Fail grading system for full-semester courses in Spring 2020 in response to the COVID-19 crisis.

DEAN'S PRIZE, awarded to the students attaining the highest grade point averages for the work of the first year;

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020

*** * * * * * * NO ENTRIES BEYOND THIS POINT * * * * * * * ***

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Issued To: SETH ROSENBERG
859 CRESTVIEW AVE
REFNUM:59861640
VALLEY STREAM, NY 11581-3117

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

Course Level: Undergraduate
First Admit: Fall 2014
Last Admit: Fall 2015

Current Program
Bachelor of Arts
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law

Degree Awarded Bachelor of Arts 20-MAY-2018
Primary Degree
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
201590		Advanced Placement EXM				
CHEM	101	Intro To Chemistry I	4.00	T		
ECON	162	Principles Of Macroeconomics	4.00	T		
HIST	1XX	1XX Level Course	4.00	T		
HUM	XXX	Humanities Elective	4.00	T		
MATH	1XX	100+ Level Course	4.00	T		
MATH	221	Calculus I	4.00	T		
PLSC	111	Intro To Amer Politics	4.00	T		
SOCS	XXX	Social Science Elective	4.00	T		
Ehrs: 32.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2015						
UG Harpur						
BA Philosophy Politics and Law						
AAAS	284B	Modern India 1757-2000	4.00	A	16.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
PHIL	107	Existence and Freedom (LEC)	4.00	A	16.00	
PSYC	111	General Psychology	4.00	A	16.00	
WRIT	111	Coming to Voice	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	103A	Foundations Of America (LEC)	4.00	A	16.00	
HIST	225	Imperial Russia	4.00	A	16.00	
PHIL	140	Intro To Ethics	4.00	A	16.00	
THEA	102	Introduction To Theater	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Fall 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	325	Red Phoenix: Revolution & USSR	4.00	A-	14.80	
PHIL	146	Law & Justice (LEC)	4.00	A-	14.80	
PHIL	147	Markets, Ethics And Law (LEC)	4.00	A	16.00	
PLSC	340	Public Opinion	4.00	A-	14.80	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.40 GPA: 3.77						
Dean's List						
Good Standing						
Spring 2017						
UG Harpur						
BA Philosophy Politics and Law						
ASTR	114	Sun, Stars And Galaxies	4.00	A	16.00	
ASTR	115	Observational Astronomy Lab	1.00	A	4.00	
HIST	374	China In The 20th Century	4.00	A	16.00	
PHIL	345	Philosophy Of Law	4.00	A	16.00	
PLSC	323	Congress In Amer Politics	4.00	A-	14.80	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 66.80 GPA: 3.92						
Dean's List						
Good Standing						
********** CONTINUED ON PAGE 2 **********						

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2017						
UG Harpur						
BA Philosophy Politics and Law						
HIST	380D	Global Early American Republic	4.00	A	16.00	
HWS	210	Men's Personal Wellness	4.00	A	16.00	
PHIL	456C	Justice and Gender	4.00	A	16.00	
PHIL	497	Critical Thinking Pedagogy	1.00	A	4.00	
PLSC	389W	Political Parties	4.00	A	16.00	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 68.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2018						
UG Harpur						
BA Philosophy Politics and Law						
ENG	360R	Romanticism	4.00	A	16.00	
HWS	110	Taekwondo	2.00	A	8.00	
PSYC	391	Practicum In College Teaching	4.00	P	0.00	
THEA	391	Practicum In College Teach I	4.00	A	16.00	
Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 40.00 GPA: 4.00						
Good Standing						
Last Standing: Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	96.00	92.00	363.20	3.94
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	128.00	92.00	363.20	3.94

********** END OF TRANSCRIPT **********

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

WRITING SAMPLE

The attached writing sample is a ten-page excerpt of a memorandum that I drafted as a research assistant for Stephen Burbank, the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. I performed all the research, and this work is entirely my own.

Memorandum

To: Stephen B. Burbank

From**:** Seth Rosenberg

Date: July 27, 2020

Re: Literature Review

I. Focus of Memo

This memo identifies and discusses scholarship concerning the mechanisms of legal change when comparing the U.S. Supreme Court and the Federal Courts of Appeal. One partial aim of the research conducted for this memo is to assess who the true first movers are when it comes to legal change, or, in other words, which part of the judicial hierarchy is doing the leading, and which part is doing the following. It has been said that the Supreme Court is never too far ahead of public opinion.[1] Instead of addressing questions related to the Supreme Court's responsiveness to the broader populace, this memo addresses slightly different questions: Is the Supreme Court ever too far ahead of the lower courts? Or, alternatively, are the lower courts ever too far ahead of the Supreme Court?

II. Sources of Legal Change

a. The Scholarly Landscape – A Summary

I found some articles that directly focused on legal change,[2] and others that discussed the issue through a particular level of the judiciary.[3] Most articles that discussed legal change primarily focused on the Supreme Court.[4] I was, however, able to find articles that placed an

[1] *See, e.g.*, DEBORAH L. RHODE, LAWYERS AS LEADERS (2013).

[2] *See e.g.*, Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 U.C.L.A. Rev. 343, 345 (1998) ("One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change."); Douglas Rice, *The Impact of Supreme Court Activity on the Judicial Agenda*, 48 LAW & SOC'Y REV. 63 (2014) ("I find evidence in both trial and appellate courts that Supreme Court attention to policy areas subsequently leads to *fewer* cases being heard and decided in those policy areas in the lower courts. Yet I also find evidence of additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue.").

[3] *See, e.g.*, Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 596 (2017) ("In this Article, we consider the more basic question of lower court adherence to precedent. We address this principally by analyzing U.S. district court judges' treatment of precedents from the Supreme Court and courts of appeals across an eighty-year span.")

[4] *See, e.g.*, Bethany J. Ring, Comment, *Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality*, 23 CHAP. L. REV. 205 (forthcoming Winter 2020). Other authors focused on the Supreme Court but did not ignore the limits the Court faces in changing the law. *See* Baxter, *supra* note 2, at 345 ("Given the

emphasis on the lower courts.[5] Not all authors were confident in their analysis of legal change,[6] which suggests further study in this area is warranted. One article had shades of normativism,[7] and seemed to argue that regardless of whether the lower courts *do* affect legal change, it is their role to do so and, therefore, they *should* affect legal change.[8]

b. The Importance of the Lower Courts in Studying Legal Change

Even if the data demonstrates that the Supreme Court affects legal change, the lower courts will still be doing most of the legwork. So, studies of the Supreme Court's ability to change the law are incomplete without accounting for how the lower courts respond to the Court's actions.[9] It is important to gauge the extent that the Court affects the agenda of the lower courts, because if such an influence is found, then "the Court shapes both policy and lower court opportunities for compliance with the Court's preferences on that policy."[10] A more subtle way the Court can affect the issues dealt with by the lower courts is through the effects the Court has on litigants. When the Court speaks, others listen, and adapt.[11] The types of litigants primarily interested in individual success might be replaced by others primarily interested in moving public policy.[12] The Court's actions alter "the attention the federal courts devote to [an issue] and thus the influence the judiciary has on that issue, in subsequent years."[13]

Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention.").

[5] For example, one article assessed the role, over time, that the lower courts have played in the development of the law and concluded that "today's district court judges play a far less active role in shaping the law than their predecessors did." Devins & Klein, *supra* note 3, at 597.

[6] One author found mixed evidence of Supreme Court influence. *See* Rice, *supra* note 2, at 64 (finding that, in some policy areas, once the Supreme Court addressed an issue it led to "fewer cases being heard and decided in those policy areas in the lower courts," but also finding "evidence of . . . additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue").

[7] For a more detailed description of normative arguments, see Adam J. Kobler, *How to Fix Legal Scholarmush,* 95 IND. L.J. 1191, 1196 ("Descriptive claims address the way the world is, was, or will be. . . . Normative claims, by contrast, speak to how the world ought to be.").

[8] *See* Devins & Klein, *supra* note 3, at 599 ("[T]he doctrine of dicta compels the judge deciding a case to make her "own decision.").

[9] Ring, *supra* note 4, at 208 ("[T]o understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required . . . [otherwise,] unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining [the literature] . . . .").

[10] Rice, *supra* note 2, at 63.

[11] *Id.* at 64. ("The Court's attention shifts the very participation of certain actors seeking to influence public policy in the federal courts, as issue areas go from being characterized by broad-based litigation to being characterized by less litigation, but more sophisticated participants.")

[12] *Id.*

[13] *Id.* at 65.

c. The Mechanisms of Legal Change

Just as authors utilizing a complexity approach spoke in terms of an equilibrium,[14] some authors did the same when adopting a framework to evaluate legal change.[15] The displacement of entrenched aspects of legal regimes creates an influx of complexity, and, as discomfort with newly ambiguous areas of the law permeates throughout the legal system, it sets "off a search for more determinate rules."[16] One way to study the mad dash that follows changes to prior understandings of law, is to focus on the questions that surround the fate of past cases decided under now-changed legal frameworks.[17] "Transitional moments"[18] in the law are not created equally: the more a change in the law implicates a "potential to unsettle the outcome of an enormous number of already decided cases,"[19] the more difficult the transitional period will be.

However, not every change in the law is necessarily destabilizing.[20] The degree of impact a legal change will have on the overall system is dependent on the context of the attempted change and whether these changes apply retroactively or prospectively. For example, grandfathering provisions, which provide that activities "initiated under an old rule will continue to be governed by that rule," are an example of some of the tools that can be "used to limit the impact of a legal change."[21] Other than the latter tools, external actors affected by legal change can make

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[14] *See, e.g.,* Doni Gewirtzman, *Lower Court Constitutionalism,* 61 AM. U.L. REV. 457, 499, 503 n. 243 (2012) ("Systems theorists often measure a system's performance by looking at the systems' resilience and adaptive capacity: its ability to survive, adjust, and thrive in a changing environment."); J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1388 (2011) (defining the adaptive capacity of legal systems as "the system's ability to respond to "threats to system equilibrium … by changing resilience strategies without changing fundamental attributes of the system").

[15] *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Equilibrium theory provides a framework for evaluating legal change as a function of the legal context into which that change is introduced."); Hathaway, *supra* note 27, at 606, 609 (arguing that "[t]he doctrine of stare decisis . . creates an explicitly path-dependent process," and that when assessed as an "increasing returns" path dependent process, we should expect the law to produce "multiple [possible] equilibria"); Kastellec, *The Judicial Hierarchy: A Review Essay, supra* note 5, at 10 ("In equilibrium, the Supreme Court is most likely to review cases from the side of the conflict it eventually rules against, because these cases are most informative.").

[16] *Id.* at 740.

[17] Toby J. Heytens, *The Framework of Legal Change*, 97 CORNELL L. REV. 595, 595-96 (2012) ("[T]he same basic question arises again and again: What should we do about all those other cases that courts have already resolved using legal principles that were subsequently tweaked, overhauled, or rejected? In a previous article, I called situations raising that question 'transitional moments.'").

[18] *Id.*

[19] *Id.*

[20] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Adoption of a new legal rule can, but need not, constitute a destabilizing influence on the underlying legal structure. Equilibrium theory thus provides a tool for judging stability within the legal system.").

[21] *Id.* at 1067.

impactful change more difficult, if only because it can be hard to fully predict how such actors will respond to legal change. For example, as social workers become more involved with divorce proceedings, the role of social workers and the tenor of divorce proceedings have changed concurrently.[22] A separate but related issue is the possibility that external actors fail to respond to legal change at all. The potential for the law to affect societal change has it limits.[23] And while the source cited in the latter footnote focused on the economy, and not the judiciary, it at least appears intuitively correct that the Supreme Court's attempts at legal change would butt heads with deep-rooted norms in the lower courts in ways that would lessen the Court's overall impact.

Legal change is most likely to occur where the law is indeterminate. This is because judges are unlikely to change the law where it is settled and clear, or at least this is the expectation. Confusion in the law is where legal scholars can assist lower courts left without guidance,[24] but unfortunately, "[s]cholars currently lack a concrete theory of how courts should proceed in such situations."[25] Worse still, the solutions offered to the Supreme Court's unstable approach to statutory interpretation seem to imply that any consistent approach is better than no consistency at all, that uniformity and simplicity are *per se* virtues for the Court when they make changes to the law.[26] In deciding how to change the law, and when, the Court must "negotiate the trade-off between the institutional and epistemic benefits of formal law and the costs of applying flawed tests."[27]

To fully flesh out the above discussion of legal indeterminacy, it is necessary to see how and why such gaps in the law develop. The Court's decision to change the law, and the extent that

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[22] Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 743-744 (1988) ("As the formal role of social workers evolved, so did their ideology and rhetoric. Consistent throughout the evolution of social workers' involvement with divorce, however, has been their perception that their appropriate function is to make divorce as conflict-free as possible, or at least to manage the conflict appropriately.")

[23] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-stakeholder Divide*, 36 IOWA J. CORP. L. 59, 111 (2010) ("[T]here is reason to doubt that legal change alone will lead to structural or institutional change in the actors and relationships that are entrenched in the economy.").

[24] Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 594 (2018) (arguing that the way the Courts have dealt with the scope of the Fourth Amendment is one example of what the author terms a "legal blank slate," because "formal law is essentially silent on the issue, yet judges are compelled to set some standards to guide future courts and other legal actors, [and thus,] [c]ourts seeking to move beyond the confusion of current Fourth Amendment law are left with a blank slate.").

[25] *Id.* at 591.

[26] *Id.* at 211-12 ("The explicit premise of much of this work is that 'often it is not as important to choose the best convention as it is to choose one convention and stick to it.' I refer to this trend toward simplification and uniformity as "the dumbing down of statutory interpretation.") (footnote omitted).

[27] Tokson, *Blank Slates*, *supra* note 196, at 596.

they can succeed in this effort, is a pendulum that swings from hyperactivity to complete silence. This dynamic occurs over the course of decades, and, despite the fact that this often leaves the lower courts without guidance for long stretches at a time, the lower courts are still tasked with developing the law in these areas.[28] Sometimes the confusions produced by Supreme Court decisions are accidental, but that does not mean the Court is quick to correct the unintended consequences of its decisions.[29] However, it is hard to believe the Court is entirely innocent when changes in the law develop after a decision is issued.[30]

One manifestation of the Court's varying level of activity in addressing gaps in the law are intercircuit splits. The resolution of intercircuit splits is "responsible for the lion's share of legal development in federal courts."[31] Although splits create difficulties for the judicial system, the resource constraints imposed on the Court make splits somewhat unavoidable. This is because "the Supreme Court depends crucially on litigation in lower courts to yield information about the relationship between legal rules and outcomes in the real world."[32] In other words, one can think of legal changes as hypotheses put forth by the Supreme Court and the responses of the lower courts as the data necessary to assess those hypotheses. The Court benefits from leaving an area of the law untouched for long stretches of time because allowing the lower courts to develop the

[28] *See, e.g.*, Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727, 741 (1999) ("While the Supreme Court has taken a noticeable hiatus from section 7 jurisprudence, the lower courts and the enforcement agencies have continued to refine the process of merger analysis."); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 384 (2020) ("During the Court's jurisdictional *hiatus*, the *lower courts* developed and applied a framework for adjudicative authority constructed, to the extent possible, from the *Supreme Court*'s binding pronouncements. This undertaking was not [easy,] predominantly due to the Supreme Court's avoidance of--or inability to resolve--several foundational jurisdictional issues.")

[29] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 435 ("[The] *Marks* 'narrowest ground' doctrine has failed to accurately predict the outcome of future Supreme Court decisions. This failure can lead to discontinuity and uncertainty regarding important legal principles because of the break between prior interpretations of Supreme Court decisions by lower federal courts and the Supreme Court's later, conflicting resolution."). One author succinctly described the mechanism for how accidental legal change occurs. *See* Hasen, *supra* note 25, at 792 ("Inadvertence occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice's values.").

[30] One author, discussing various ways Supreme Court Justices move the law, was less equivocal. *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781-82 (2012) ("[P]erhaps the most common reason that a Justice will vote to hear a case will be to make some change in existing law.")

[31] Beim & Rader, *supra* note 25, at 450.

[32] Clark & Kastellec, *supra* note 8, at 152.

law gives the Supreme Court a far more extensive record of the effects of attempted changes to the law. Additionally, more eyes should infuse more creativity into the law.

The resolution of intercircuit splits—and by extension the decision to change the law—is a tradeoff. The Court must choose between the costs associated with leaving splits unresolved[33] on the one hand, and the informational benefits received from "allowing other lower courts to make their own independent judgments,"[34] on the other. When the Court resolves a split, "[i]t chooses to forego the additional information it might glean from allowing the legal question to further play out in the lower courts."[35] At the same time, however, resolution of intercircuit splits "swiftly eliminates the lack of uniformity in the law created by the conflict, by settling the issue."[36] Multiple models of the Court's behavior with regard to circuit splits indicate that "the Court should be more likely to end a conflict immediately . . . when a conflict emerges after several lower courts have already weighed in on a new legal issue."[37]

Although when resolving intercircuit splits, and by extension affecting legal change, the Court tends "to join the [position taken by a] majority of circuits,"[38] sometimes the Court disregards widespread views in the lower courts.[39] Thinking of the judicial process as a dialectic might help explain why the latter occurs.[40] If we view interactions between the Supreme Court

[33] *Id.* (discussing how *United States v. Booker*, 543 U.S. 220 (2005), "which ruled that federal district court judges were to treat the U.S. sentencing guidelines as advisory rather than mandatory," caused an intercircuit split, which effectively meant that "defendants with similar cases faced different standards of appellate review of their sentences, depending on where they committed their crimes").
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 10. *See also* Beim & Rader, *supra* note 25, at 449 ("'Well-percolated' splits . . . are no more likely to be resolved by the Supreme Court. The likelihood of resolution does not increase as more cases arise in a split.")
[38] Clark & Kastellec, *supra* note 8, at 152. *See also* Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 9 ("[W]hen the justices review circuit conflicts, they are more likely to come down on the side of the issue that was favored by a majority of the circuits, suggesting that the justices are engaging in vertical learning.").
[39] *See, e.g.*, Heytens, *The Framework of Legal Change*, *supra* note 188, at 597 ("Until 2009, the widespread view in the lower courts was that a police officer who had lawfully arrested [drivers,] could, without need for any further justification, search the entire passenger compartment of the vehicle. In *Arizona v. Gant*, [556 U.S. 332 (2009),] however, the Supreme Court rejected that position . . . ."). The same author went on to point out that *Gant* is not the first time "the Supreme Court changed the law in a way that threatened to call into question a great many previous convictions and sentences. The Warren-era Court, of course, did that sort of thing all the time. But the Rehnquist-era Court did it quite a few times too . . . ." *Id.* 603.
[40] *See, e.g.* Siegel, *supra* note 18, at 1187 ("The dialectical, side-by-side model of judicial interactions developed in this Article is distinct from approaches that emphasize either top-down hierarchy or bottom-up resistance or percolation.").

and the lower courts as a conversation, then this phenomenon makes more sense. Under this view, the federal courts are "a system in which lines of communication and influence can run back and forth, not just down."[41] When the Court speaks, it has the final say in this conversation, but the lower courts still retain a powerful voice. So, it makes sense that, as in any conversation between a superior and a subordinate with valued opinions, the Court, in resolving splits, sometimes listens to the majority of circuits, and other times appears to flout them.

The dynamic between the Court and the lower courts is better described as an informational dialectic, as the Court and the lower courts are not truly "talking." This dialectic begins when the Court establishes precedent with "a degree of uncertainty regarding how these precedents will actually play out . "[42] Then, as the lower courts implement that precedent, the ideological nature of that implementation, provides "information to [the Supreme Court] about the implications of the precedent as it is applied to contemporary disputes."[43] Lastly, the Court then uses "this information to correct its body of precedent."[44] Where the Court has not put forth firm precedent, such as with a plurality decision, the lower courts have a greater role in this dialectic.[45] One major caveat to this discussion is that while reasoning from lower court opinions should benefit the Supreme Court, "it is unclear whether that reasoning actually reaches the Supreme Court."[46]

While the above discussion of the mechanisms of legal change is important, it is equally valuable to assess the multiple options available to the Court when it seeks to change the law. One author argued that the problem with past scholarship on how the Supreme Court affects the lower courts is that it focuses on the "decision-making stage, but [ignores] the prior step in which cases actually arrive in lower courts."[47] The same author went on to argue that understanding whether the Supreme Court can and does manipulate "what is on the agenda of the lower federal courts . . . is crucial to understanding the decision-making process."[48] These comments suggest

[41] Siegel, *supra* note 18, at 1223-24.
[42] Hansford et al., *supra* note 7, at 894.
[43] *Id.* at 895.
[44] *Id.*
[45] *See* Marceau, *supra* note 148, at 975-76 ("Under the limited class of cases in which the Court applies Marks there is often substantial deference shown to lower court agreement as to the precedent flowing from a prior plurality.")
[46] Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction,* 74 OHIO ST. L.J. 423, 439 (2013).
[47] Rice, *supra* note 172, at 65.
[48] *Id.*

that there is still much to learn regarding the Supreme Court's ability to change the law.[49] However, there were some authors who at least catalogued the potential methods the Court can use to change the law. Some approaches to changing the law are direct: the Court can expressly try to change the law by overruling or extending precedent;[50] or alternatively, the Court can invite "litigants to argue for the overruling or extension of precedent."[51] Other methods are less direct, such as anticipatory overruling, where the Court signals that while precedent is safe for the moment, it may not fare much better in the future.[52] In the past anticipatory overruling were more overt, but recently "the Court has backed off such express anticipatory overrulings."[53] Related to the practice of anticipatory overruling is "stealth overruling,"[54] in which the Court functionally, but not explicitly, overrules an existing precedent. One way this can happen is through overly complex qualifications on the precedential value of an opinion or legal rule.[55] Still other methods of changing the law are hiding in plain sight: what one author described as "time bombs,"[56] or "seemingly offhand, throwaway phrases that [are then] exploited in later cases."[57]

Regardless of the Court's actual impact on the state of the law, there are built-in limits to the Court's influence. The Court constrains itself through both formal and informal "rules and norms

[49] *Id.* ("[W]e do not know whether and how the Supreme Court influences what lower federal courts discuss and decide. Yet history suggests influence does exist.").
[50] Hasen, *supra* note 25, at 782.
[51] *Id.* at 784.
[52] *Id.* at 783 (describing the Court's decision in Northwest Austin Municipal Utility District Number One v. Holder, 129 S. Ct. 2504 (2009), as "signaling that [the Court] would not be so charitable when reviewing the [constitutionality of section five of the Voting Rights Act] in the next case").
[53] *Id.* at 784. One author quoted Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), as an example of past anticipatory overrulings. This example serves as a useful reference point for how the Court has transitioned in its use of this tactic. *See id.* ("[T]he Court held that the Bankruptcy Act of 1978 was unconstitutional . . . [but] stayed its own ruling to give Congress 'an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of bankruptcy laws.'").
[54] Hasen, *supra* note 25, at 780 ("The Roberts Court also has engaged in 'stealth overruling.' Stealth overruling occurs when the Court does not explicitly overrule an existing precedent. Instead, it 'fails to extend a precedent to the conclusion mandated by its rationale,' or it 'reduces a precedent to nothing.'").
[55] *See, e.g.*, Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1535 (2008) (quoting an example of disingenuous judicial behavior, provided by legal scholar Karl Llewellyn, whereby a court distinguishes "a prior decision by declaring 'this rule holds only of redheaded Walpoles in pale magenta Buick cars.'") (footnote omitted).
[56] *Id.* at 789. (giving credit for the term to SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).
[57] *Id.* (quoting SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).

that govern the Court's own decision-making processes,"[58] and is additionally constrained by forces, such as losing litigants who do not seek appeal, that work to diminish "the occasions upon which the Court will have an opportunity to issue law-changing decisions."[59] Of particular relevance, when the Court attempts to move the law, it must account for the viability of faithful implementation in the lower courts.[60] Stare decisis is likely the most well-known limitation imposed on the Court. Because stare decisis is based "on the need for consistency, efficiency, [and] predictability,"[61] it acts as a judicial levee preventing a constant flood of legal change. Even though stare decisis can be circumvented by creatively distinguishing or reconciling precedent, such "creativity must be bounded by intellectual candor."[62] One author seemed to imply that the degree of faithfulness to stare decisis is a function of the Court's appetite for legal change.[63] Luckily, however, the Justices are not entirely free to change the law on a whim, as there are costs to legal change.[64]

The general requirement of reason-giving inherent to opinion writing is arguably heightened when considering attempted changes to the law. [65] While the latter is supposed to limit those Supreme Court Justices that are hungry for legal change, one author expressed concern that this intuitively heightened reason-giving requirement has been abandoned in an "insidious manner."[66] For example, in *Gonzales v. Carhart*,[67] "the Court upheld the constitutionality of a federal law prohibiting so-called 'partial birth abortions,' even though the Court had held a virtually identical state law unconstitutional seven years earlier . . . [but] offered no principled

[58] Baxter, *supra* note 119, at 346.
[59] *Id.* at 345.
[60] *See* Tokson, *Judicial Resistance and Legal Change*, *supra* note 25, at 967 ("In general, judicial resistance to doctrinal change may present another obstacle to the pursuit of meaningful social change via the courts.").
[61] Stone, *supra* note 229, at 1534.
[62] *Id.*
[63] *Id.* at 346.
[64] *See, e.g. id.* ("[O]verruling has costs for the prevailing majority – perhaps impaired relations with fellow Justices who would have adhered to the precedent, the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.").
[65] *See id.* ("[T]he Court is expected to provide reasoned explanations for its decisions. This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.") (footnotes omitted). One author normatively argued that even if one posits that there is not a heightened requirement for reason-giving, there ought to be one. *See* Stone, *supra* note 229, at 1534 ("[B]ecause the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.").
[66] Stone, *supra* note 229, at 1537-38 ("Their technique, which was perfectly anticipated and ridiculed by Karl Llewellyn, is to purport to respect a precedent while in fact cynically interpreting it into oblivion.").
[67] 127 S. Ct. 1610 (2007).

basis for ignoring the earlier decision."[68] The positions offered by Justices in recent situations where the Court has arguably perverted stare decisis are only supportable "if they were writing on a clean slate."[69] However, the Court is *not* writing on a clean slate, and so, when the Court functionally overrules precedent but does not own up to what it is doing, it is being dishonest. Such dishonesty is damaging to judicial integrity and confounding for the study of legal change.[70]

d. Notes for Future Scholarship in this Area of the Law

Supreme Court decisions need time to breathe before an adequate assessment of their impact is possible.[71] Unfortunately, "a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects."[72] Moreover, because it is in the Court's best interests not to draw attention to itself when acting with the potential for public backlash, scholars are alone sometimes in choosing cases which have already or will in the future produce legal change.[73] So even results that appear to demonstrate either the Court's failure to create legal change or a choice not to must be taken with a grain of salt, as the Court could be "stealth overruling."[74] The sometimes covert nature of legal change leads to misfires: scholars anticipate a certain case in the pipeline will effect momentous legal change, and then no such change occurs.[75] This demonstrates either that changes in the law are generally difficult to predict or that scholars do not yet fully understand how legal change occurs; thus, this is an area ripe for further study.

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[68] Stone, *supra* note 229, at 1538 (footnote omitted).
[69] *Id.*
[70] One author argued that "[t]he sad truth is that Roberts and Alito seem to have been driven by nothing more than their own desire to reach results they personally prefer . . . ." *Id.* Of course, the Court has not always been fully honest in its opinions, and so this is not a new phenomenon. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO L.J. 1, 4 (2010) ("Stealth overruling is assuredly not unique to the Roberts Court . . . the Warren Court, for example, did it as well . . . .").
[71] Ring, *supra* note 174, at 207 ("Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time.").
[72] *Id.*
[73] Hasen, *supra* note 25, at 780 ("Despite the Citizens United ruling, and maybe now more because of the public reaction to it, express overrulings of precedent are rare.").
[74] *Id.*
[75] *See* Ring, *supra* note 174, at 207 ("Because they operate as the final say, Supreme Court opinions are ofttimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.").

Applicant Details

First Name	**Chaz**
Last Name	**Rotenberg**
Citizenship Status	**U. S. Citizen**
Email Address	**crotenberg@law.fordham.edu**
Address	**Address** **Street** **119 S Station Ave** **City** **Avon-by-the-Sea** **State/Territory** **New Jersey** **Zip** **07717** **Country** **United States**
Contact Phone Number	**202 492 4797**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2015**
JD/LLB From	**Fordham University School of Law** **https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships**
Date of JD/LLB	**May 23, 2021**
Class Rank	**33%**
Law Review/ Journal	**Yes**
Journal(s)	**Fordham Urban Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Saiger, Aaron
ASAIGER@law.fordham.edu
(212) 636-7736
Huntington, Clare
chuntington@law.fordham.edu
212.636.6832
Paul-Emile, Kimani
PAULEMILE@law.fordham.edu
(212) 636-7541

References

Please see attached "Chaz Rotenberg_References"

This applicant has certified that all data entered in this profile and any application documents are true and correct.

February 14, 2022

The Honorable John D. Bates
United States District Court
for the District of District of Columbia
333 Constitution Avenue, Northwest
Washington, DC 20001

Dear Judge Bates:

As a graduate with honors from Fordham University School of Law and a Stein Scholar in Public Interest Law, I write to apply for the clerkship with your chambers for the 2022-2023 term. I am particularly interested in clerking for you because of your strong commitment to public service. Also, I intend to move back to the District, where I grew up and attended Oyster Bilingual Elementary and Georgetown Day School. As a prospective litigator, I hope to work at the intersection of access to education, immigration, and juvenile justice. The opportunity to clerk for and learn from you would be invaluable in serving the public.

If given the opportunity, I would be well prepared. I am currently clerking for the Honorable Robin J. Stacy in New Jersey Superior Court. In that capacity, I review motions, draft orders and decisions, prepare the Judge for oral argument, and serve as a mediator in disputes between parties for family-related matters. As this was the Judge's first year on this court, I also helped organize a backlogged docket to enable orderly administration and case management. Before clerking, I served as an intern with various legal advocacy organizations. At Advocates for Children, I drafted a class action lawsuit filed in the Southern District of New York requesting the NY State and City Education Departments establish an expedited process to provide services to students with disabilities who lost instruction during remote learning. With the Legal Aid Society, I wrote memoranda on the denial of care for senior Medicaid recipients and the unlawful arrests of undocumented immigrants at New York civil courthouses.

In addition to my work experiences, I developed my legal research and writing skills during law school. In the Legislative and Policy and Advocacy Clinic, I wrote Freedom of Information Law requests to obtain educational materials that New York prosecutors use to inform jurors on the grand jury process. Furthermore, the *Fordham Urban Law Journal* published my note, "The Path Less Traveled: Afrocentric Schools and Their Potential for Improving Black Student Achievement While Upholding *Brown*." My note describes the history of Afrocentric schools as a response to failed public school integration, considers the legal and policy arguments concerning an Afrocentric education, and, ultimately, proposes public investment in Afrocentric schools.

I have enclosed my resume, law school transcript, and a writing sample for your review. My application also includes letters of recommendation from Professors Clare Huntington, Kimani Paul-Emile, and Aaron Saiger. Thank you for your kind consideration of my application.

Respectfully,

Chaz Rotenberg

Chaz Rotenberg

CHAZ ROTENBERG

119 S Station Ave, Avon-by-the-Sea, NJ 07717 | (202) 492-4797 | crotenberg@law.fordham.edu

BAR ADMISSION: Passed New York State July 2021 Bar Exam

EDUCATION

Fordham University School of Law, New York, NY
J.D., *cum laude*, May 2021
Honors: Stein Scholar in Public Interest Law and Ethics; Archibald R. Murray Public Service Award (*summa cum laude*); Public Interest Resource Center Student Leadership Award; Fordham Law Merit Scholarship; Paul Fuller Scholar
Note: *The Path Less Traveled: Afrocentric Schools and Their Potential for Improving Black Student Achievement While Upholding* Brown, 47 FORDHAM URB. L.J. 1173 (2020)
Activities: Fordham Urban Law Journal; 1L Contracts, *Teaching Assistant*; Stein Scholars 1L Academic Committee, *Chair*; Education Law Collaborative, *Co-President*, *3L Advisor*; Diversity, Equity & Inclusion Student Working Group

University of Michigan, Ann Arbor, MI
B.A., Economics and Organizational Studies, May 2015

EXPERIENCE

Hon. Robin J. Stacy, New Jersey Superior Court, Freehold, NJ **August 2021 – August 2022**
Law Clerk, Monmouth County, Family Division
Draft judicial decisions. Facilitate Consent Conferences between litigants and/or attorneys to settle economic, parenting time, and custody disputes.

Lincoln Square Legal Services, Inc., New York, NY **Academic Year 2020 – 2021**
Legal Intern, Legislative and Policy Advocacy Clinic, Fordham University School of Law
Advocated for grand jury reform in New York State with an emerging social justice group. Wrote FOIL request and administrative FOIL appeal. Worked to establish a coalition with New York City public defender and community organizations. Met with New York Senate staffer to assess interest in reform. Edited proposed legislative bills.

Suspension Representation Project, New York, NY **Academic Years 2018 – 2021**
Volunteer Advocate (1L year), *Director of Fordham Law Chapter* (2L year), *3L Advisor* (3L year)
Represented public-school students at New York City Department of Education (NYCDOE) administrative suspension hearings. Oversaw weekly Fordham Law phone intake for families seeking volunteer representation. Collaborated with local legal services organizations to improve project trainings, intake capacity, and transparency.

Advocates for Children of New York, New York, NY **Summer 2020**
Legal Intern
Drafted federal class action complaint alleging NYCDOE and New York State Education Department (NYSED) denied students their special education rights during COVID-19 pandemic. Wrote FOIL appeal of NYSED's denial of a request for a state accountability measure. Represented students and families at Individualized Education Plan (IEP) meetings.

The Legal Aid Society, New York, NY **Spring 2020**
Legal Extern, Civil Practice Law Reform Unit
Wrote memorandum developing counterclaims to withholding of discovery in class action lawsuit alleging New York State Department of Health denied dental care for senior residents on Medicaid. Wrote memorandum analyzing subsidized housing provisions under the Coronavirus Aid, Relief, and Economic Security Act.

Mobilization for Justice (Formerly MFY Legal Services), New York, NY **Summer 2019**
Legal Intern, Children's Rights Program
Represented families at NYCDOE impartial hearings to access special education rights; prepared clients and witnesses to testify; prepared direct and cross-examination questions. Wrote due process complaints requesting relief from NYCDOE. Drafted affidavits and stipulations.

LANGUAGES & INTERESTS

Proficient in Spanish (comfortable interviewing and advising clients, drafting and translating documents).
Enjoy stand-up comedy, running, chess, cooking, NBA & NFL, Olympics, World Cup, and Latin music and dance.

FORDHAM UNIVERSITY
THE SCHOOL OF LAW

LINCOLN CENTER CAMPUS
150 West 62nd Street
New York, NY 10023

Name: Chaz Rotenberg

Student ID: A16725645 DOB: 30-JUL SSN: *** - ** - 2108

Previous Institution(s):
UNIV MICHIGAN ANN ARBOR* Sep 2011 - May 2015

COURSE #	COURSE TITLE	CRED	GRD	PTS
Course Level: Juris Doctor				
Current Program				
Juris Doctor				
College : Law School				
Major : Law Day				
Degree Awarded Juris Doctor 22-MAY-2021				
Primary Degree				
College : Law School				
Major : Law Day				
Inst. Honors: cum laude				
INSTITUTION CREDIT:				
Fall 2018				
Law School				
Law Day				
1st time adm at level-mat only				
CNGL 0104	CONTRACTS 3	5.000	B+	16.665
CRGL 0103	CRIMINAL LAW 3 & 4	3.000	A-	11.001
LTGL 0106	LEGAL WRITING/RESRCH 3B	2.000	IP	.000
LWGL 0105	LEGAL PROCESS AND	1.000	P	.000
PRGL 0107	PROPERTY 3 & 4	4.000	B-	10.668
Ehrs:	13.000 QPts:	38.334		
GPA-Hrs:	12.000 GPA:	3.195		
Spring 2019				
Law School				
Law Day				
Continuing Registration				
CVGL 0101	CIVIL PROCEDURE 3 & 4	4.000	B-	10.668
FCGL 0102	CONSTITUTIONAL LAW 3 & 4	4.000	B	12.000
FCGL 0129	LEGISLATION & REGULATION 3 & 4	4.000	B+	13.332
LTGL 0106	LEGAL WRITING/RESRCH 3B	3.000	A-	11.001
TOGL 0108	TORTS 3 & 4	4.000	B	12.000
Ehrs:	19.000 QPts:	59.001		
GPA-Hrs:	19.000 GPA:	3.105		
Summer 2019				
Law School				
Law Day				
Continuing Registration				
CLGL 0311	CLIN EXTERN:STEIN SCHOL FLD	2.000	P	.000
CLGL 1311	CLIN EXTERN: STEIN SCHOLAR SEM	1.000	B+	3.333
Ehrs:	3.000 QPts:	3.333		
GPA-Hrs:	1.000 GPA:	3.333		
Fall 2019				
Law School				
Law Day				
Continuing Registration				
CLGL 0350	Fundamental Lawyering Skills	3.000	A-	11.001
EHGL 0299	Prof Resp: Lawyers and Justice	3.000	A-	11.001
INGL 0101	Independent Study	1.000	CR	.000
ITGL 0347	Immigration Law	4.000	A-	14.668
JUGL 0601	Education Law	2.000	A	8.000
********** CONTINUED ON NEXT COLUMN **********				

COURSE #	COURSE TITLE	CRED	GRD	PTS
Institution Information Continued:				
LTGL 0900	Writing Requirement	0.000	S	.000
Ehrs:	13.000 QPts:	44.670		
GPA-Hrs:	12.000 GPA:	3.723		
Spring 2020				
Grades are not included in GPA due to the coronavirus.				
Law School				
Law Day				
Continuing Registration				
BUGL 0201	Corporations	4.000	P	.000
CIGL 0521	Race and the Law	3.000	P	.000
CIGL 0551	Poverty Law	2.000	P	.000
CLGL 0303	Extern: Civil Gov NP Fldwk	2.000	P	.000
CLGL 1303	Extern: Civil Sem	1.000	P	.000
Ehrs:	12.000 QPts:	0.000		
GPA-Hrs:	0.000 GPA:	0.000		
Fall 2020				
Law School				
Law Day				
Continuing Registration				
CLGL 0510	Clinic Sem: Policy and Leg	2.000	A-	7.334
CLGL 0520	Clinic Cswk: Policy and Leg	3.000	A	12.000
CRGL 0413	Juvenile Justice Survey	2.000	A	8.000
DRGL 0337	Family Law	3.000	B+	9.999
FCGL 0828	Slavery and the Constitution B	2.000	A-	7.334
Ehrs:	12.000 QPts:	44.667		
GPA-Hrs:	12.000 GPA:	3.722		
Spring 2021				
Law School				
Law Day				
Continuing Registration				
CIGL 0230	Critical Race Theory	2.000	A-	7.334
CLGL 0520	Leg & Policy Advoc Clinic Cswk	3.000	A	12.000
CLGL 0694	Leadership for Lawyers	1.000	A-	3.667
CRGL 0323	Crim Pro: Investigative	3.000	A-	11.001
ITGL 0963	Crimmigration	2.000	A-	7.334
LTGL 0302	Adv Legal Writing Strategies	2.000	B+	6.666
Ehrs:	13.000 QPts:	48.002		
GPA-Hrs:	13.000 GPA:	3.692		
Dean's List				
********** TRANSCRIPT TOTALS **********				
INSTITUTION	Ehrs: 85.000 QPts:	238.007		
	GPA-Hrs: 69.000 GPA:	3.449		
TRANSFER	Ehrs: 0.000 QPts:	0.000		
	GPA-Hrs: 0.000 GPA:	0.000		
OVERALL	Ehrs: 85.000 QPts:	238.007		
	GPA-Hrs: 69.000 GPA:	3.449		
********** END OF TRANSCRIPT **********				

CHAZ ROTENBERG

Vanessa C. Garcia
Vanessa C. Garcia
Assistant Dean and Registrar, School of Law

Not considered official without Seal or Registrar's Signature.

Date Issued: 30-NOV-2021 Page:1

FORDHAM UNIVERSITY SCHOOL OF LAW
EXPLANATION OF TRANSCRIPT

Grade Scale for the Juris Doctor (J.D.)

Effective Fall 2014		Prior to Fall 2014	
Grade	**Quality Points**	**Grade**	**Quality Points**
A+	4.333	A+	4.30
A	4.000	A	4.00
A-	3.667	A-	3.70
B+	3.333	B+	3.30
B	3.000	B	3.00
B-	2.667	B-	2.70
C+	2.333	C+	2.30
C	2.000	C	2.00
C-	1.667	C-	1.70
D	1.000	D	1.00
F	0.000	F	0.00
P	Not in GPA	P	Not in GPA
S	Not in GPA	S	Not in GPA

Class Ranking - The Law School does not calculate class rankings.

Transfer Credit - Transfer credit (ex. TA, TB, etc.) represents work applicable to the current curriculum and must be a minimum of a ≠C /≠grade to be accepted. Transfer credit is not included in the weighted grade point average.

Repeating Courses - Only a course with a failed grade may be repeated. Failed required courses must be repeated. Failed elective courses may be repeated, however this is not required. If repeated, the quality points of the new grade will be half in value (ex. F/A would be 2.00 quality points). The original failing grade remains on the transcript.

Grade Scale for Master of Laws (LL.M.) and Master of Studies in Law (M.S.L.)

Effective Fall 2017	
Grade	**Quality Points**
H+	4.2
H	4.0
H-	3.8
VG+	3.6
VG	3.4
VG-	3.2
G+	3.0
G	2.8
G-	2.6
P+	2.4
P	2.2
P-	2.0
F	0.0

Prior to Fall 2017	
Grade	**Description**
H (Honors)	Outstanding performance
VG (Very Good)	Excellent performance
G (Good)	Above average performance
P (Pass)	Performance worthy of credit
F (Fail)	Inferior performance that does not satisfy the minimum standard for course credit

Effective Fall 2014 within each grade level (H, VG, G, P), students may be awarded a plus (+) or minus (-) to distinguish performance on the high end or the low end within the grade level.

Grade Scale for Legal Writing and Introduction to U.S. Legal System Courses

(These grades are not factored into honors determinations)

Students Admitted Prior to Fall 2017

Grade	Description
HP (High Pass)	Outstanding
PA (Pass)	Good or Acceptable
LP (Low Pass)	Passing, but deficient performance
FA (Fail)	Performance unworthy of credit

Students Admitted Prior to Fall 2011

Grade	Description
H (Honors)	Outstanding
CR (Credit)	Good or Acceptable
F (Fail)	Performance unworthy of credit

Grade Scale for Doctor of Juridical Science (S.J.D.)

Grade	Description
CR	Credit
NR	No Credit

Administrative Grades that May be Used in J.D., LL.M., and M.S.L Programs

AUD (Auditing)
CR (Credit)
INC (Incomplete)
IP (In Progress: year long course, final grade assigned in succeeding term)
NC (No Credit)
NGR (No Grade Received)
S (Satisfactory)
U (Unsatisfactory)
W (Withdrew)

Student education records on reserve are maintained in accordance with Public Law 93-380, sec 438, ≠The Family Education Rights & Privacy Act /≠FERPA).The policy of Fordham University pertinent to this legislation is available from the Registrar upon request.

CHAZ ROTENBERG

119 S Station Ave, Avon-by-the-Sea, NJ 07717 | (202) 492-4797 | crotenberg@law.fordham.edu

WRITING SAMPLE

The attached writing sample is a legal memorandum I wrote during my summer 2020 internship at Advocates for Children of New York ("AFC"). The memorandum surveys the class action complaints brought nationwide for the denial of a Free Appropriate Public Education (FAPE) during the COVID-19 pandemic. Relatedly, I drafted a class action lawsuit, which sought similar relief on behalf of New York students. The memorandum served as a research reference for the class action lawsuit, which AFC later filed in the Southern District of New York. The memorandum is solely my work, and AFC authorized its use.

Published note: Chaz Rotenberg, *The Path Less Traveled: Afrocentric Schools and Their Potential for Improving Black Student Achievement While Upholding Brown*, 47 FORDHAM URB. L.J. 1173 (Forthcoming June 2020).

Attorney Work Product *Advocates for Children of New York*

To: Rebecca Shore, Director of Litigation, Advocates for Children of New York

From: Chaz Rotenberg, 2020 Summer Legal Intern, Advocates for Children of New York

Date: Friday, August 7, 2020

Re: Class Action Lawsuits of FAPE Denials Brought due to COVID-19 & Federal and State DOE Guidance

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TABLE OF CONTENTS

I. Introduction

This memorandum surveys the class action complaints brought nationwide for the denial of a Free Appropriate Public Education (FAPE) during the COVID-19 pandemic. Specifically, it analyzes the types of claims brought and the remedies plaintiffs sought. As the coronavirus has spread across the United States, most school districts have closed down their school buildings and moved to online learning.

As districts continue to restrict in-person instruction, they are still required to provide students with disabilities a FAPE. On March 12, 2020, the U.S. Department of Education ("US DOE") issued a fact sheet to states providing informal guidance stemming from its interpretation of federal special education law in light of the unprecedented circumstances imposed by the COVID-19 outbreak.[1] The US DOE advised that if schools stop learning for general education students across a school district, then the district would have no obligation to provide IEP services for students with special needs.[2] However, once schools do provide any education to the general education population, then IEP services are due.[3] If a district is unable to provide such IEP services, districts must provide compensatory education once school resumes.[4]

Furthermore, in an April 27, 2020 statement, Secretary of Education Betsy Devos did not recommend that Congress pass any additional waiver authority concerning FAPE and Least Restrictive Environment (LRE) requirements of the Individual with Disabilities Education Act (IDEA).[5] Indeed, Secretary Devos reiterated that "learning must continue for all students during the COVID-19 national emergency."[6] Devos determined that under federal law, there is no reason that a student's access to a FAPE cannot continue online through distance education or other

[1] FACT SHEET, QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK, U.S. DEP'T OF EDUC. (Mar. 2020), https://www.isbe.net/Documents/qa-covid-19-03-12-2020.pdf [hereinafter DEP'T OF EDUC. MARCH FACT SHEET].
[2] *Id.* at 2.
[3] *Id.* (citing 34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)).
[4] *See id.*
[5] *See* Press Release, SECRETARY DEVOS REITERATES LEARNING MUST CONTINUE FOR ALL STUDENTS, DECLINES TO SEEK CONGRESSIONAL WAIVERS TO FAPE, LRE REQUIREMENTS OF IDEA, U.S. DEP'T OF EDUC. (Apr. 27, 2020), https://www.ed.gov/news/press-releases/secretary-devos-reiterates.
[6] *Id.*

alternative strategies.[7] As such, there is mounting pressure on states to provide students with a FAPE during a remote learning era.[8]

In some states, parents have filed class action lawsuits against the state's department of education ("DOE") or governor.[9] These complaints claim that under the IDEA, state DOEs deny a FAPE for students with disabilities.[10] Claims also include civil rights discriminations, violations of Section 504 of the Rehabilitation Act ("Section 504"), and violations of the Americans with Disabilities Act (ADA).[11] Plaintiffs seek a wide range of remedies, such as declaratory relief, equitable remedies, appointment of a special master, prospective injunctive relief, and attorney's fees. In one class action filed in New York by Patrick Donohue Law Firm and Brain Injury Rights Group, plaintiffs seek monetary compensatory and punitive damages. They also seek independent evaluations for every member of the class. Sections II.A and II.B will review three of such class action lawsuits: Hawaii, Pennsylvania, and New York. Section II.C will provide the potential legal obstacles to these class action FAPE denial complaints.

In other states, where families have not yet filled class action suits, some DOEs have taken a proactive approach to meet the impending onslaught of impartial hearing requests. Section III will summarize governors' executive orders and guidance from state DOEs.

II. Class Action Complaints for Denial of a FAPE During COVID-19

This section will review the class action complaints filed in the federal district courts of Hawaii, Pennsylvania, and New York. In each instance, the lawsuits allege that the state (or states) denied a class of students a FAPE. The plaintiff class is broader in scope in the Hawaii and New York suit than it is in Pennsylvania.

A. Types of Class Action Claims Brought

[7] For a list of principles the Department considered in making its decision, see *id.*

[8] For a full review of U.S. Department of Education guidance, see Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, AMERICAN BAR ASS'N (Mar. 31, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/are-special-education-services-required-in-the-time-of-covid19/.

[9] *See infra*, Section II.A, B.

[10] *See id.*

[11] *See id.*

1. Hawaii – W.G. v. Kishimoto[12]

Parents of students with special needs are suing the Hawaii Department of Education ("Hawaii DOE") in federal court for allegedly denying a FAPE due to school closures spurred by the coronavirus crisis. The complaint seeks to represent a class of roughly 30,000 children in Hawaii with special needs between the ages of 3 and 22.[13]

Plaintiffs allege that the Hawaii DOE provided non-disabled students educational related services but failed to provide students eligible for federal protection under Section 504 and students eligible under the IDEA access to educational-related services. Plaintiffs allege the following three civil rights violations:

1) Violation of civil rights (42 U.S.C. § 1983) of **Section 504** (29 U.S.C. § 701);
2) Violation of civil rights (42 U.S.C. § 1983) of the **IDEA** (20 U.S.C. § 1400); and
3) Violation of civil rights (42 U.S.C. § 1983) **'Class of One'** Claim.[14]

The Plaintiff Class specifically denotes the state's "material failure to implement [eligible students'] IEP or Modification Plan during spring of 2020."[15] Furthermore, Plaintiffs claim that the Hawaii DOE's "failure to coordinate and ensure a FAPE is a systematic failure of the State, resulting in thousands of civil rights violations."[16] For example, Plaintiff H.S. demonstrated "dramatic behavioral, academic and educationally related regression, areas of concern in his IEP."[17] The complaint also claims that the state materially failed to implement spring 2020 extended school year (ESY) services,[18] and that the Hawaii DOE discriminated against students based on their disability by providing educational access to students *not* eligible under the IDEA or Section 504.[19]

On July 8, 2020, the parties entered a Rule 16 scheduling conference before Magistrate Judge Rom Trader. On July 17, 2020, the court directed the clerk's office to reassign the case to a

[12] Complaint, W.G. v. Kishimoto, No. 1:20CV00154 (D. Haw. Apr. 13, 2020) [hereinafter Haw. Complaint].
[13] *Id.* at 5.
[14] *Id.* at 10–14.
[15] *Id.* at 5, 7. "[The] DOE has materially failed to provide [Student] T.K. with his accommodations in his MP since or about March 2020." Id. at 10.
[16] *Id.* at 8.
[17] *Id.* at 9.
[18] *Id.* at 7. "[Student H.S.] was eligible for ESY services, but the DOE materially failed to implement those services." Id. at 9.
[19] *Id.* at 4, 8, 11.

Hawaii district court judge.[20] As the Hawaii complaint looms large, parents in Pennsylvania seek a class action representing a seemingly smaller portion of students with special needs.

2. Pennsylvania – DOE et al. v. WOLF et al.[21]

Two families with kids with autism in the Central Bucks Schools District sued the Pennsylvania Department of Education (Pennsylvania DOE) and Pennsylvania Governor Tom Wolf for denying education during the government-ordered coronavirus school shutdown.[22] Central to the parents' claim is that Gov. Tom Wolf allegedly failed to name in-person public education to nonverbal and partially verbal children with autism — kids for whom online instruction and services are ineffective — as a "life-sustaining" service.[23] Plaintiffs also allege a FAPE denial. The outcome of the lawsuit, seeking class-action status and filed in the Eastern District in federal court, could potentially affect thousands of students with disabilities in Pennsylvania.[24]

Plaintiffs allege that since the school closures, school districts have offered nonverbal and partially verbal children with autism *only* online learning, which "is wholly inadequate."[25] Nonverbal and partial verbal children with autism require intensive, in-person education to learn, such as hand-over-hand assistance.[26] One of the two plaintiffs, James, a 7-year-old *nonverbal* student with autism who relies on augmentative/alternative communication ("AAC"), used to receive 32 and a half hours per week of in-person instruction.[27] In contrast, James' online education "is only – at best – one hour and fifteen minutes per week."[28] The complaint also alleges that due to Governor Wolf's decisions, there is no plan to provide James with in-person ESY services as required by his IEP.[29] The second plaintiff, Brennan, a 7-year-old *partially verbal* student with autism who relies on AAC, is also receiving online instruction for only one hour and fifteen

[20] Case Reassignment: Civil case number CV 20-00154 LEK-RT on all further pleadings. (Entered: 07/20/2020).
[21] Complaint, DOE et al. v. WOLF et al., No. 2:20CV02320 (E.D. Pa. May 18, 2020) [hereinafter Pa. Complaint].
[22] *Id.* at 1.
[23] *Id.* at 12
[24] *See* Kristen A. Graham, *Kids with Autism Being Denied an Education During the Pandemic, Pa. Lawsuit Says,* PHILADELPHIA INQUIRER (May 19, 2020), https://www.inquirer.com/education/coronavirus-lawsuit-education-autism-governor-wolf-pennsylvania-bucks-county-20200519.html.
[25] *Id.* at 5.
[26] *Id.*
[27] *Id.* at 9.
[28] *Id.* at 16 (emphasis included).
[29] *Id.* at 19.

minutes per week.[30] Additionally, Brennan requires "hand over hand instruction," where a trained educator physically prompts and assists the student in completing a task—learning that cannot effectively occur in a remote environment.[31]

The Pennsylvania lawsuit differs from the Hawaii suit in two noteworthy ways. First, the Pennsylvania plaintiff class is significantly narrower. Here, Plaintiffs define their classes as nonverbal (Plaintiff Class 1) and partially verbal (Plaintiff Class 2) public school students who rely on AAC in programs of no less than 2:1 student to teacher/aide ratios.[32] Although it is uncertain exactly how many children in Pennsylvania represent the above defined class, the "lawsuit is filed on behalf of the hundreds if not thousands of nonverbal and partially verbal children with autism within [Pennsylvania] who rely on AAC who receive instruction is public schools as required under [IDEA] . . . and Section 504."[33] The complaint alleges the following violations (three for each Plaintiff Class):

1) Governor Wolf and Pennsylvania Violated the **IDEA**;
2) Governor Wolf and Pennsylvania Department of Education Violated **Section 504**; and
3) Pennsylvania Department of Education Violated the **ADA**.[34]

As to the ADA claim, the complaint alleges that nonverbal and verbal children with autism who use AAC have rights under the ADA because these children are designated as "disabled."[35] Thus, plaintiffs allege that if students only receive an online education, the Pennsylvania DOE violated the ADA.[36]

Second, Pennsylvania plaintiffs are directly suing Governor Thomas Wolf for his discretion in determining which businesses may remain open during coronavirus. On March 19, 2020, Governor Wolf classified business that could remain open as "life-sustaining."[37] These businesses included tobacco manufacturing, fireworks manufacturing, casino construction, and hair replacements.[38] But it did not include private or public schools serving nonverbal or partially

[30] *Id.*
[31] *Id.* at 20.
[32] *Id.* at 11–12.
[33] *Id.* at 6.
[34] *Id.* at 6–8.
[35] *Id.* at 7 (citing elements to an ADA claim in *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260 (3d Cir. 2013)).
[36] *Id.*
[37] *Id.* at 2.
[38] For a full list of "life-sustaining" businesses, see *id.* at 3.

verbal students with autism.[39] Governor Wolf allowed some businesses to apply for "waivers" to keep the physical workplace open if they were not among the industries designated as "life-sustaining."[40] Before the Pennsylvania Supreme Court, the Wolf administration argued that "the selection of which businesses to close requires that a balance be struck: close too few businesses and the disease will spread uninterrupted, while closing too many will make it impossible for people to access life-sustaining goods and services." [41] Thus, the complaint alleges that Governor Wolf has unjustifiably deemed the manufacture of products such as tobacco, which is scientifically proven to be a danger to health, as "life-sustaining," but not for services of public school children with autism.[42] Plaintiffs allege that a FAPE is, in fact, "life-sustaining."

On June 10, 2020, Plaintiffs moved to dismiss the complaint without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). That same day, District Judge Chad F. Kenney ordered the complaint dismissed without prejudice.

3. New York (and 13 Other States) – J.T. et al. v. de Blasio et al.[43]

On July 27, 2020, parents of students with disabilities in New York and 13 other states[44] sued the NYC DOE, Mayor de Blasio, school districts, and state departments of education across the country.[45] The plaintiff class is defined broadly as "a student who was 3 to 21 years of age between March 2020 and July 2020" who has a disability under the IDEA and Section 504 and was denied rights because of their disability. The plaintiffs, represented by Patrick Donohue Law Firm LLC and the Brain Injury Rights Group, state 11 separate claims that include violations of 42 U.S.C. § 1983, the IDEA, Section 504 of the ADA, Title II of the ADA, and State Constitution or Statutes. Many of the claims are similar to the Hawaii and Pennsylvania lawsuits, such as the failure to provide a FAPE under the IDEA and Section 504 and violations of civil rights under Section 1983. Other claims stood out, however.

[39] *Id.* at 2.
[40] *Id.*
[41] Friends of Danny Devito v. Wolf, 68 MM 2020, *15 (Pa. Apr. 13, 2020).
[42] Pa. Complaint at 4.
[43] Complaint, J.T. et al v. de Blasio et al, No. 1:20-cv-0587 (S.D.N.Y July 28, 2020) [hereinafter N.Y. Complaint].
[44] States include California, Connecticut, Florida, Illinois, Indiana, Minnesota, North Carolina, New Jersey, Ohio, Pennsylvania, South Carolina, Virginia, and Washington.
[45] The complaint totals 350 pages with attached appendices.

For instance, Plaintiffs here claimed that defendants violated the procedural requirements of the IDEA.[46] Such violations included failing to provide parents notice of a change in students' educational program and placement and the unilateral modification of students' educational program and placement.[47] Relatedly, plaintiffs claimed defendants failed to ensure that parental participation and due process were used or provided.[48]

Plaintiffs also uniquely claim that defendants failed to provide pendency under the IDEA. Specifically, that defendants violated plaintiffs' pendency rights under 20 U.S.C. § 1415(j) by failing to provide an educational program and placement that maintained students' educational program and placement during the pendency of the due process complaint.[49] Plaintiffs also argue that although the IDEA has an "exhaustion" requirement, an action alleging the violation of the pendency provisions falls within one or more exceptions to the exhaustion prerequisite.[50]

Plaintiffs also claim that Defendants unilaterally, substantially, and materially altered the location of where the students were to receive services, from a school classroom to the most restrictive environment along the continuum of services: students' home.[51] Plaintiffs argue that a unilateral change from classroom to total isolation at home would violate the Supreme Court's express preference for educating students in the least restrictive environment and with their typically developing peers.[52]

Relatedly, Plaintiffs claim that the Defendants unilaterally, substantially, and materially altered the delivery of these services by precluding students from receiving any in-person services by special education teachers or related services providers, which constitutes an improper change of educational program as discussed in *T.Y. v. N.Y.C. Dep't of Educ.* 584 F.3d 412, 419 (2d Cir. 2009).[53] Moreover, Students' IEPs do not provide for the remote provision of special education or related services. In most cases, Defendants unilaterally, substantially, and materially altered the frequency and duration of Plaintiff-Students' related services, if they provided them at all.[54]

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[46] *See* N.Y. Complaint at 67–68, 75.
[47] *Id.* at 75 (citing 20 U.S.C. § 1401, et seq., 34 C.F.R. part 300)).
[48] *Id.*
[49] *Id.* at 67 (citing Honig v. Doe, 484 U.S. 305, 311–312 (1988) ("The IDEA includes a number of procedural safeguards 'that guarantee parents both an opportunity for meaningful input into all decisions altering their child's education and the right to seek review of any decisions they think inappropriate.")).
[50] Id. at 50 (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002)).
[51] *Id.* at 68.
[52] *Id.* (citing *Honig*, 484 U.S. 305, 313 (1988)).
[53] *Id.* at 69.
[54] *Id.* at 70.

To address coronavirus, Plaintiffs claim there is no "pandemic exception" to the IDEA. If a student's educational placement becomes unavailable, then the school district must find a comparable alternative placement.[55]

B. Types of Remedy Sought

1. Hawaii – Plaintiffs Seek Declaratory Relief, Equitable Remedy, and Appoint a Special Master, Among Others

In *W.G. v. Kishimoto*, the Plaintiffs seek declaratory relief, an equitable remedy, request to appoint a special master, and reasonable attorney's fees and costs.[56] The primary relief is to prompt a court-ordered process that makes it easier for parents, once schools do reopen, to determine the compensatory education their child needs to make up for the months of lost educational services during the time of school shutdowns.[57] Plaintiffs request that the Hawaii DOE establish the equitable remedy with "criterion and procedures that involve Plaintiffs' data, standardization, categorization, and formula."[58] As to declaratory relief, plaintiffs request the right to pursue individual remedies for compensatory education in collateral actions against the Hawaii DOE at the administrative level.[59] Plaintiffs seek declaratory relief, which will allow the right to pursue individual remedies in collateral actions at the administrative level using collateral estoppel to efficiently seek relief for Plaintiffs and the numerous declaratory relief class members.[60] Plaintiffs also ask the Hawaii federal district court to appoint a special master to coordinate and monitor Hawaii DOE's compliance with any settlement.[61] Otherwise, the DOE and court system could see a flood of due process suits from parents after the coronavirus crisis passes.

2. Pennsylvania – Plaintiffs Seek Prospective Injunctive Relief & Declaratory Relief, Among Others

In *DOE et al. v. WOLF et al.*, Plaintiffs seek prospective injunctive relief, declaratory relief, attorney's fees, and further equitable relief.[62] The suit requests "compensatory damages" for

[55] *Id.* (citing *Knight v. District of Columbia*, 278 U.S. App. D.C. 237, 877 F.2d 1025, 1028 (D.C. Cir. 1989)).
[56] Haw. Complaint at 12–14.
[57] *Id.* at 4-5, 12
[58] *Id.* at 5.
[59] *Id.* at 4.
[60] *Id.*
[61] *Id.* at 14.
[62] *Id.* at 28–29.

students represented by the class action. The declaratory and prospective injustice relief asks the court to strike down Pennsylvania's ban against in-person school services for nonverbal and partially verbal children with autism and to classify in-person education of both Plaintiff Classes as a "life-sustaining" service. [63]

Plaintiffs also pointedly argue that administrative remedies under the IDEA would be "futile or inadequate" because schools "cannot grant relief" to the Plaintiff Classes in the form of resumption of their in-person education.[64] Furthermore, "[i]n light of ongoing injuries of the Plaintiffs Classes, 'exhaustion (of the administrative remedies under IDEA) would work severe or irreparable harm upon' both plaintiff classes."[65]

3. New York & 13 States – Plaintiffs Seek Declaratory Relief, Preliminary Injunction, Compensatory Damages, Punitive Damages, Among Others

Here, Plaintiffs seek an order that the Defendants violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, IDEA, Title II of the ADA, Section 504, and State Constitutions or Statutes.

Plaintiffs also seek either an immediate reopening of the schools to implement a substantially similar educational program as outlined in students' IEPS or have a "Pendency Voucher" issued to students to provide an opportunity to self-cure the violations of the Defendants. Plaintiffs claim this outcome is consistent with the legal advice of the school district law firm, Sweet, Stevens, Katz & Williams LLP: "A hearing officer, moreover, could not order an LEA to maintain a pre-closure brick-and-mortar program in violation of the governor's school closure and social distancing orders. The hearing officer could, presumably, order a different array of virtual services than those the LEA has proposed."[66]

Notably, Plaintiffs seek an order directing school districts to immediately conduct extensive independent evaluations of students to ascertain their levels of educational performance. Moreover, Plaintiffs seek compensatory education plans for students based upon the independent evaluations and due to the educational regression caused by the failure to provide a FAPE.

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[63] *Id.* at 28.
[64] *Id.* at 15.
[65] *Id.* at 15 (citing *Beth V. by Yvonne*, 87 F.3d 80, 88-89) (quotations included).
[66] *See Model Policies – Technology*, SWEET, STEVENS, KATZ & WILLIAMS, http://www.sweetstevens.com/newsroom/coronavirus-and-schools-parent-rejection-of-continuity-of-education- (last visited August 7, 2020).

Unlike in Hawaii and Pennsylvania, Plaintiffs here seek compensatory damages for employment loss or out-of-pocket expenses incurred due to the failure to provide students with their educational programs, placements, and services as per their current IEPs.

Plaintiffs seek punitive damages based on the intentional and willful violations of IDEA, Section 504, ADA, State Constitutions and Statues, and Section 1983. Plaintiffs cite Second Circuit precedent in *Polera v. Bd. of Educ.*, which reaffirmed that monetary damages are "available in claims brought pursuant to 42 U.S.C. § 1983 for denial of access to administrative remedies under the IDEA's predecessor statute, the EHA."[67] *Polera* and other district courts in the Second Circuit have followed *Quackenbush v. Johnson City Sch. Dist.*, which held that damages are available on claims brought under Section 1983 for violations of the IDEA.[68][69]

C. Potential Legal Responses to Class Action FAPE Denial Complaints

Class action lawsuits calling for equitable remedies due to school closures due to COVID-19 — the Hawaii lawsuit, in particular — face two possible hurdles.

1. The IDEA Requires Parents to Exhaust their Administrative Remedies

Under the IDEA, plaintiffs must first exhaust their administrative remedies when seeking relief.[70] "Exhaustion" means parents need to file a due process complaint before they can file a complaint in federal court unless doing so would be "futile or inadequate,"[71] as was argued in the Pennsylvania complaint, but not in Hawaii. The 7th Circuit has previously denied attempts to use a class action to obtain compensatory services for large groups of students because individualized determinations are necessary.[72] Two law firms, who represent Illinois schools, argue that because

[67] 288 F.3d 478, 492 (2d Cir. 2002).
[68] 716 F.2d 141, 148 (2d Cir. 1983), cert. denied, 465 U.S. 1071 (1984).
[69] For a greater discussion of compensatory and punitive monetary damages, see paragraphs 102–108 of the complaint.
[70] In *Fry v. Napoleon Community School*, the Supreme Court held that "if a suit brought under such a law "seek[s] relief that is also available under" the IDEA, the plaintiff must first exhaust the IDEA's administrative procedures." 137 S. Ct. 743, 748 (2017) (citing 20 U.S.C. § 1415(l)).
[71] Honig v. Doe, 484 U.S. 305, 327 (1988).
[72] *See* Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 495 (7th Cir. 2012) (holding "the certified class combined all disabled students eligible for special education from MPS who were not identified as potentially eligible for services, not timely referred for evaluation after identification, not timely evaluated after referral, not evaluated in a properly constituted IEP meeting, or whose parents did not (for whatever reason) attend an otherwise proper IEP meeting."). *But see* DL v. District of Colombia, 302 F.R.D. 1 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) (holding plaintiffs satisfied prerequisites for class certification in four subclasses, divided according to specific IDEA violation alleged).

the plaintiffs in *W.G.* (Hawaii) failed to exhaust their administrative remedies, the lawsuit will likely result in the federal court dismissing the complaint outright.[73] Said differently, in this situation, a due process hearing is a better vehicle to determine whether a school provided an individual student a FAPE, if not, what compensatory education would remedy the loss.[74] HLERK LLP further argues given the very individualized nature of determining the appropriateness of a student's IEP services, as well as the student's regression to calculate the level of compensatory education services (if necessary), it is unlikely that the plaintiffs will prevail on their attempt to be certified as a class.[75]

2. Suits Assume Widespread Denial of FAPE Due to School Closures

The second hurdle for *W.G.*, as argued by *Franczek LLP*, is that the suit "assumes a widespread denial of [FAPE] due to the school closure, which will not be true across the board." While some students may have experienced unreasonable delays in services or other problems, merely moving to remote learning is not an automatic denial of FAPE, especially when the change was mandated for all students by emergency orders during a pandemic.[76] Franczek importantly points out that the US DOE has acknowledged flexibility in methodology and how services are delivered during this challenging time.[77] Furthermore, the FAPE standard includes consideration of the student's circumstances. For some students, appropriate progress in light of school closures and stay-at-home orders will be different from appropriate progress in a traditional school setting. Thus, according to Franczek, the *W.G.'s* claim that the school closure automatically led to a denial of a FAPE for every student within the class is unsupported.

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[73] *See Special Education Students Sue Hawaii DOE for Compensatory Ed Services for State's Denial of FAPE during COVID-19*, HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN LLP (Apr. 29, 2020), https://hlerk.com/special-education-students-file-class-action-suit-against-hawaii-department-of-education-requesting-compensatory-education-services-for-the-states-failure-to-provide-fape-during-covid-19-scho/ [hereinafter HLERK LLP]; Dana Fattore & Kendra Yoch, *Hawaii Comp Ed Class Action: Don't Panic. Plan.*, FRANCZEK LLP (Apr. 24, 2020), https://www.specialedlawinsights.com/2020/04/hawaii-comp-ed-class-action-dont-panic-plan/.

[74] *See* Fattore & Yoch, *supra* note 73.

[75] *See* HLERK LLP, *supra* note 73.

[76] *See id.*

[77] SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES, U.S. DEP'T OF EDUC. 1 (Mar. 21, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf ("In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible.").

III. Responses by Governors and State DOEs

This section outlines the actions that various governors and state departments of education (state DOEs) have taken in response to special education and remote learning during COVID-19. To date, every single state DOE has released guidance concerning COVID-19.[78] Below is a review of how individual states have dealt with compensatory education during the pandemic.

A. Kansas DOE Guidance

The Kansas Department of Education is considering compensatory education on a case-by-case basis. If there were interruptions in providing IEP services during the 2019-20 school year due to school closures, IEP teams must make an individualized determination whether and to what extent compensatory services may be needed.[79] Compensatory services may be necessary when there is a decline in a student's skills that occurred due to the student not receiving services during an extended school closure (or an extended student absence) caused by the COVID-19 outbreak. The student's IEP Team must also review the student's IEP and determine whether any changes to the IEP are needed due to the extended absence from school. An IEP Team may consider using informal assessments or screenings to determine whether there have been changes in a student's performance. According to Kansas DOE, the safest approach would be for IEP Teams to begin making these determinations at the beginning of this school year as soon as sufficient predictive data is obtained and then continue to assess this on an ongoing basis.

B. Idaho DOE Guidance

Idaho Department of Education decided to keep its school buildings open during the pandemic in a limited capacity to provide their students with disabilities in-person instruction or other limited school accesses.[80] To meet these needs, schools may still use their facilities for serving students as long as services are provided within the CDC social distancing guidelines.[81]

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[78] N.Y. Complaint, Appendix E at 235.

[79] *See* SCHOOL YEAR 2020-21 COMPLIANCE WITH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE KANSAS SPECIAL EDUCATION FOR EXCEPTIONAL CHILDREN ACT FOR REOPENING SCHOOLS DURING THE COVID-19 PANDEMIC, KANSAS STATE DEP'T OF EDUC. at 9 (Aug. 3, 2020) https://www.ksde.org/Portals/0/ECSETS/Announcements/COVID-SpEd-FAQ.pdf.

[80] *See* COVID-19 SCHOOL OPERATIONS GUIDANCE – 03/27/20, IDAHO STATE BD. OF EDUC. at 1, https://boardofed.idaho.gov/resources/covid-19-school-operations-guidance-3-27-2020/.

[81] *Id.*

C. Michigan DOE Guidance

Michigan requires districts to provide special education and related services to students with IEPs regardless of the challenges of the COVID-19 pandemic and public health emergency.[82] The Michigan Department of Education ("Michigan DOE") May 18, 2020 revised guidance cites the IDEA and the Michigan Administrative Rules for Special Education as authority.[83]

When school buildings are closed due to the COVID-19 pandemic, Michigan school districts must implement a continuity of learning plan. IEP teams must also ensure each student with an IEP has equal access to the same opportunities, including, and to the greatest extent possible, a FAPE.[84] Under a "Continuity of Learning Plan," districts explain how they will provide educational instruction to all students. The plan should target English Language Learners, low-income students, and students eligible under Section 504 and the IDEA. A child's IEP team is encouraged to consider the definition of specially designed instruction in the context of a district's continuity of learning plan. "Specially designed instruction" means adapting, as appropriate to the needs of each exceptional child, the content, methodology or delivery of instruction to (1) address the unique needs of the child that result from the child's, and (2) ensure access of the child with a disability to the general curriculum (in this instance, a district's continuity of learning plan), so the child can meet the educational standards.[85]

Furthermore, Michigan DOE guidance seems to provide an exception for a FAPE during the pandemic. The guidance states: "In this unique and ever-changing environment, these exceptional circumstances may affect how all educational and related services and supports are provided. A FAPE may include, as appropriate, special education, and related services provided through a continuum of instruction opportunities that may be provided virtually, through instructional materials sent home, or telephonically."[86]

Finally, the guidance explicitly states that the "Michigan Department of Education will provide further guidance regarding compensatory education at a later date."[87]

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[82] *See* GUIDANCE FOR COMPLIANCE WITH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE MICHIGAN ADMINISTRATIVE RULES FOR SPECIAL EDUCATION DURING THE COVID-19 PANDEMIC, MICH. DEP'T OF EDUC. 3 (revised May 18, 2020).
[83] *See id.*
[84] *Id.* at 4.
[85] *Id.* at 5.
[86] *Id.* 5–6.
[87] *Id.* at 6.

D. New Hampshire Emergency Order

In an emergency order, New Hampshire Governor Christopher Sununu required that by June 30, 2020, each school district to hold IEP team meetings to consider ESY services for every student with an IEP, regardless of whether a student has been provided ESY in the past.[88] The IEP team may consider in-person ESY programs and remote ESY programs.[89] School districts must also consider compensatory services, if any, required to make up for services not provided during the period of remote instruction, student regression, or a student's failure to make expected progress as indicated in the student's IEP.[90] Finally, schools may not waive requirements for provisions relating to the timing of evaluations and IEP team meetings except for any classroom evaluation criteria that cannot be satisfied because of the shift to remote instruction.[91]

E. New Jersey DOE Guidance

In New Jersey, the State Board of Education adopted temporary rule modifications of New Jersey's Administrative Code, which govern special education and related services.[92] The State Board, acting under Executive Order No. 103 (Murphy, 2020), adopted temporary regulations that allow school districts and educational agencies to deliver special education and related services to students with disabilities through the use of telehealth, telemedicine, electronic communications, remote, virtual, or other online platforms, during an extended public-health related school closure.

New Jersey DOE Guidance noted that the rule modifications alone do not ensure that school districts and educational agencies will meet their legal obligation to provide FAPE.[93] These rule modifications intend to provide IEP Teams with the flexibility necessary to implement services during unprecedented school closures. However, the modifications do not relieve school

[88] *See* STATE OF NEW HAMPSHIRE GOVERNOR CHRISTOPHER WOLF, SPECIAL EDUCATION REQUIREMENTS TO SUPPORT REMOTE INSTRUCTION, EMERGENCY ORDER #48 PURSUANT TO EXECUTIVE ORDER 2020-04 AS EXTENDED BY EXECUTIVE ORDERS 2020-05, 2020-08 AND 2020-09 (Mar. 13, 2020).
[89] *See id.*
[90] *See id.*
[91] *See id.*
[92] Peggy McDonald, PROVIDING SPECIAL EDUCATION AND RELATED SERVICES TO STUDENTS WITH DISABILITIES DURING EXTENDED SCHOOL CLOSURES AS A RESULT OF COVID-19, NEW JERSEY DEP'T OF EDUC. (Apr. 3, 2020), https://www.nj.gov/education/broadcasts/2020/apr/3/Providing%20Special%20Education%20and%20Related%20Services%20to%20Students%20with%20Disabilities%20During%20School%20Closures%20as%20a%20Result%20of%20COVID-19.pdf.
[93] *Id.*

districts and educational agencies of the responsibility to ensure that the services implemented are properly individualized and those most appropriate for a student with disabilities.[94]

F. Wisconsin DOE Guidance

The Wisconsin Department of Public Instruction ("Wisconsin DOE") seeks to establish "additional services" for students with IEPs to meet the demand for lost educational opportunities.[95] In doing so, the Wisconsin DOE acknowledges that schools could not provide some specially designed instruction, related services, and supplementary aids and supports during coronavirus.[96] The decisions about these "additional services," including the extent and duration required, will be collaboratively made on an individual basis, and the services must supplement and not supplant the student's existing educational program.[97] In making these decisions, states' services cannot be practically replicated minute by minute.[98] Wisconsin DOE also states that "additional services" are not automatically required if a student did not receive all of the services as specified in the student's IEP.[99] "Rather, it is an individualized determination based on what additional services are required to address regression in skills."[100]

"Additional services" are *not* compensatory education. Compensatory education is the traditional relief awarded in IDEA complaints by a hearing officer. In contrast, according to the Wisconsin DOE, additional services may be required to address the disruption of educational services due to a public health emergency. In other words, the Wisconsin DOE has created a new remedy for students with disabilities to address school closures due to coronavirus specifically.

IV. Conclusion

Thus far, plaintiffs in Hawaii, Pennsylvania, and New York have filed class action lawsuits for denials of FAPE during school closure due to the COVID-19 pandemic. Claims from the complaints include violations of the IDEA, Section 504, ADA, and civil rights. In Hawaii, the

[94] *Id.*
[95] ADDITIONAL SERVICES DUE TO EXTENDED SCHOOL CLOSURES, WISC. DEP'T OF PUB. INSTRUCTION, DIV. FOR LEARNING SUPPORT (May 2020), https://dpi.wi.gov/sped/laws-procedures-bulletins/bulletins/20-01.
[96] *See id.*
[97] *Id.*
[98] *Id.* (citing Reid v. District of Colombia, 401 F.3d 516 (D.C. Cir. 2005)).
[99] *Id.*
[100] *Id.*

plaintiff class of students aged 3 to 22 with an IEP, seek an equitable remedy, declaratory relief, and appointment of a special master. The equitable remedy would require the Hawaii DOE to determine the criterion for compensatory education using the plaintiff's "data, standardization, categorization, and formula."[101] In Pennsylvania, the plaintiff classes are much narrower because they include only nonverbal and partially verbal students with autism who rely on augmentative/alternative communication in programs of no less than 2:1 student to teacher/aide ratios. Moreover, plaintiffs allege that it would be "futile or inadequate" for the defined class members to exhaust administrative remedies under the IDEA.[102] It should be noted that Pennsylvania plaintiffs have since withdrawn their complaint.

[101] Haw. Complaint at 5.
[102] Pa. Complaint at 15 (citing Beth V. by Yvonne v. Carroll, 87 F.3d 80, 88–89).

Applicant Details

First Name	**Julian**
Middle Initial	**T**
Last Name	**Schoen**
Citizenship Status	**U. S. Citizen**
Email Address	**julian.schoen@lls.edu**
Address	**Address** Street **222 N. Ave. 55** City **Los Angeles** State/Territory **California** Zip **90042** Country **United States**
Contact Phone Number	**626-272-4697**

Applicant Education

BA/BS From	**University of California-Santa Cruz**
Date of BA/BS	**June 2010**
JD/LLB From	**Loyola Law School** **http://www.lls.edu**
Date of JD/LLB	**December 15, 2021**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Loyola Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Grossi, Simona
simona.grossi@lls.edu
Trigilio, Joe
jatrig@gmail.com
Levenson, Laurie
laurie.levenson@lls.edu
(213) 736-1149

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JULIAN T. SCHOEN
(626) 272- 4697 http://www.julianschoen.com/ julian.schoen@lls.edu
222 N. Ave. 55, Los Angeles, CA 90042

March 22, 2022

The Honorable John D. Bates
The U.S. District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001

RE: August 2022-23 Clerkship

Dear Judge Bates:

I am interested in clerking in your chambers for the August 2022-23 term. Currently, I am awaiting the results from the February 2022 California Bar Exam. In December 2021, I graduated in the top 15% at LMU Loyola Law School as part of an accelerated program for evening students. Additionally, I was an editor on the law review and have a note set to be published in Fall 2022 regarding federal civil procedure.

Prior to starting law school and throughout my studies, I owned and operated an independent music publicity company for nearly a decade and supported myself financially. This work taught me how to be a self-starter, to manage multiple tasks at once, and execute results for my clients. In law school, I was fortunate to extern for Judge Otis Wright II in the Central District Court of California during the Winter 2020 term. That externship affirmed my desire to clerk and to give back to the country in the form of national service.

Enclosed in this application are my writing samples, resume, transcript, and letters of recommendation. I am available at your earliest convenience.

Respectfully yours,

Julian T. Schoen

J U L I A N T . S C H O E N

(626) 272- 4697 · http://www.julianschoen.com · julian.schoen@lls.edu
222 N. Ave. 55, Los Angeles, CA 90042

BAR ADMISSION

Sat for February 2022 California Bar Exam; awaiting results

EDUCATION

LMU Loyola Law School — **Los Angeles, CA**
Juris Doctor — December 2021
Rank/GPA: Top 15%/3.67 (Cumulative as of Fall 2021)
Honors: First Honors (highest grades in class) in Artificial Intelligence and the Law (A+*), Legal Research & Writing (A+*), Federal Courts (A+), and Civil Procedure (A+*); St. Thomas More Honor Society
Law Review: Loyola of Los Angeles Law Review, Confirmed Note Publication (Fall 2022), *Note & Comment Editor* (Fall 2021), *Staff* (2020 – 2021)

University of California Santa Cruz — **Santa Cruz, CA**
Bachelor of Arts in Modern Literature with Honors — June 2010
Study Abroad: UC Education Abroad Program, Rio De Janeiro, Brazil

EXPERIENCE

LA Noise — **Los Angeles, CA**
Owner, Independent Publicity Company — 2013 – Present

- Oversee publicity for a diverse roster of artists and labels including:
  - Oscar nominees Riz Ahmed (*Sound of Metal*) and Mica Levi (*Jackie, Under the Skin*)
  - Grammy winner Daniel Lanois & nominee Ólafur Arnalds
  - First openly gay, Black, trans hip-hop rapper Mykki Blanco
  - Representing record labels such as Warp Records, Erased Tapes, StonesThrow, LEAVING, Flying Lotus' Brainfeeder, Ninja Tune, and Gilles Peterson's Brownswood
- Negotiate, execute, oversee, and facilitate various deals with music companies and record labels

United States District Court, Central District of California — **Los Angeles, CA**
Judicial Extern to the Honorable Otis D. Wright II — January – May 2020

- Researched and composed draft orders on procedural matters, including motions to dismiss for lack of personal jurisdiction, failure to state a claim, sanctions, lack of subject-matter jurisdiction, and remand
- Researched and summarized results on substantive issues such as res judicata, issue preclusion, and reasonable attorneys' fees under lodestar analysis
- Proofread, edited, and confirmed accuracy and substance of authorities cited in draft orders
- Observed trials and hearings for civil and criminal cases

LMU Loyola Law School — **Los Angeles, CA**
Research Assistant to Professor Robert Brain — June – November 2019

- Drafted chapter on applicability and effects of e-sports on copyright law
- Analyzed, reviewed, and researched history, structures, and legal challenges involving e-sports

Outside Insight — **Los Angeles, CA**
Owner, Independent Record Label — 2017 – 2019

- Drafted, negotiated, and executed contracts with signed artists
- Produced physical product such as vinyl and cassettes, merchandise, and events

INTERESTS

Music (Joni Mitchell, Prince); Film (*City Lights*); Basketball; Chess; Hiking; Traveling

Display Transcript

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Birth Date: Feb 22, 1988
Student Type: Continuing

Curriculum Information

Current Program
College: Law
Major and Department: Law, Law

***Transcript type:UNOF is NOT Official ***

DEGREES AWARDED

Awarded: Juris Doctor **Degree Date:** Dec 17, 2021

Curriculum Information

Primary Degree
Major: Law

INSTITUTION CREDIT -Top-

Term: Law Fall 2018
College: Law
Major: Law
Student Type: Law First Time JD
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWB	1001	JD	Contracts	B	5.000	15.00		
LAWJ	1001	JD	Civil Procedure	A+*	3.000	14.00		I
LAWJ	1002	JD	Legal Research and Writing	A+	2.000	8.66		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	10.000	10.000	10.000	10.000	37.66	3.77
Cumulative:	10.000	10.000	10.000	10.000	37.66	3.77

Unofficial Transcript

Term: Law Spring 2019
College: Law
Major: Law
Student Type: Continuing

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWJ	1001	JD	Civil Procedure First Honors	A+*	2.000	9.33		I
LAWJ	1002	JD	Legal Research and Writing First Honors	A+	2.000	8.66		I
LAWK	1001	JD	Torts	B-	5.000	13.33		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	9.000	9.000	9.000	9.000	31.33	3.48
Cumulative:	19.000	19.000	19.000	19.000	69.00	3.63

Unofficial Transcript

Term: Law Summer 2019 Session I

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWD	4033	JD	Wrongful Convictions: Context, Fact, and Fiction	A-	2.000	7.33		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	2.000	7.33	3.67
Cumulative:	21.000	21.000	21.000	21.000	76.33	3.64

Unofficial Transcript

Term: Law Fall 2019

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWC	4036	JD	Habeas Corpus Litigation Seminar	A-	2.000	7.33		
LAWD	1001	JD	Criminal Law	B+	4.000	13.33		
LAWL	1001	JD	Property	CR	2.000	0.00		I
LAWP	4022	JD	Artificial Intelligence and Law Seminar First Honors	A+	2.000	8.66		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	10.000	10.000	10.000	8.000	29.33	3.67
Cumulative:	31.000	31.000	31.000	29.000	105.66	3.64

Unofficial Transcript

Term: Law Spring 2020

College: Law
Major: Law
Student Type: Continuing
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWJ	4005	JD	Judicial Process Field Placement	P	0.000	0.00		
LAWJ	5000	JD	United States Central District - Los Angeles	P	8.000	0.00		
LAWL	1001	JD	Property	CR	3.000	0.00		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	0.000	0.00	0.00
Cumulative:	42.000	42.000	42.000	29.000	105.66	3.64

Unofficial Transcript

Term: Law Summer 2020 Session I

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWJ	4012	JD	Appellate Advocacy	A	3.000	12.00		
LAWJ	4100	JD	Class Actions in the Era of COVID-19	A	2.000	8.00		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	5.000	5.000	5.000	5.000	20.00	4.00
Cumulative:	47.000	47.000	47.000	34.000	125.66	3.70

Unofficial Transcript

Term: Law Fall 2020

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWC	2003	JD	Constitutional Law	A-	4.000	14.66		
LAWF	4003	JD	Copyright Law	A	3.000	12.00		
LAWJ	4015	JD	California Civil Procedure: Practice & Procedure	B+	2.000	6.66		
LAWO	6011	JD	Law Review Staff	P	2.000	0.00		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	9.000	33.33	3.70
Cumulative:	58.000	58.000	58.000	43.000	159.00	3.70

Unofficial Transcript

Term: Law Intersession 2021

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R

LAWW	4023	JD	Deposition Workshop	P	1.000	0.00	

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	1.000	1.000	1.000	0.000	0.00	0.00
Cumulative:	59.000	59.000	59.000	43.000	159.00	3.70

Unofficial Transcript

Term: Law Spring 2021

College: Law
Major: Law
Student Type: Continuing
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWC	4012	JD	Federal Courts	A+	3.000	12.99		
LAWF	4005	JD	Trademark Law	B-	3.000	8.00		
LAWJ	2003	JD	Evidence	A-	4.000	14.66		
LAWO	6011	JD	Law Review Staff	P	1.000	0.00		I

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	10.000	35.66	3.57
Cumulative:	70.000	70.000	70.000	53.000	194.67	3.67

Unofficial Transcript

Term: Law Summer 2021 Session I

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWJ	2004	JD	Ethical Lawyering	B	3.000	9.00		
LAWJ	4008	JD	Introduction to Negotiations	A-	2.000	7.33		

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	5.000	5.000	5.000	5.000	16.33	3.27
Cumulative:	75.000	75.000	75.000	58.000	211.00	3.64

Unofficial Transcript

Term: Law Fall 2021

College: Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAWA	4003	JD	Business Associations	A-	4.000	14.66		
LAWD	4007	JD	Criminal Procedure	B+	4.000	13.33		
LAWJ	4065	JD	Fundamentals of Bar Exam Writing	P	2.000	0.00		
LAWO	6012	JD	Law Review Editor	P	2.000	0.00		

LAWO	6014	JD	Law Review Research	A+*	2.000	9.33

Term Totals (Juris Doctor)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	10.000	37.33	3.73
Cumulative:	89.000	89.000	89.000	68.000	248.33	3.65

Unofficial Transcript

TRANSCRIPT TOTALS (JURIS DOCTOR) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	89.000	89.000	89.000	68.000	248.33	3.65
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	89.000	89.000	89.000	68.000	248.33	3.65

Unofficial Transcript

RELEASE: 8.7.1

Name: Schoen, Julian Toca
Student ID: 1066024

UNIVERSITY OF CALIFORNIA, SANTA CRUZ
1156 HIGH ST. SANTA CRUZ, CA 95064

Print Date: Dec 20, 2020

Official Undergraduate

WIN QUARTER 2010			ATMPT	ERND	GR	POINTS
LIT	102	TRANSLATION THEORY	5.00	5.00	A	20.000
LTEL	190A	INDIVIDUAL AUTHORS	5.00	5.00	B+	16.500
PRTR	38B	WORKING IN TV&FILM	2.00	2.00	A-	7.400
SOCY	10	ISSUES/PRBLMS IN AM	5.00	5.00	A-	18.500
TERM GPA:	3.67	TERM TOTALS:	17.00	17.00		62.400
CUM GPA:	3.59	CUM TOTALS:	158.00	166.00		531.700

Term Honor: Dean's Honors

SPR QUARTER 2010			ATMPT	ERND	GR	POINTS
CMPE	3	PERSONAL COMPUTERS	5.00	5.00	A	20.000
FMST	148	GENDER & DEVELOPMENT	5.00	5.00	B+	16.500
HEBR	10	INTRODUCTORYYIDDISH	5.00	5.00	P	0.000
TERM GPA:	3.65	TERM TOTALS:	15.00	15.00		36.500
CUM GPA:	3.59	CUM TOTALS:	173.00	181.00		568.200

Term Honor: Dean's Honors

UNDERGRADUATE CAREER TOTALS:			ATMPT	ERND	GR	POINTS
CUM GPA:	3.59	CUM TOTALS:	173.00	181.00	158.00	568.200
UC GPA:	3.59					

NON-COURSE MILESTONES:

Univ. of Calif. Entry Level Writing Requirement
Status: Completed

American History Requirement
Status: Completed

American Institutions Requirement
Status: Completed

Senior Seminar in the Major
Status: Completed

End of Official Undergraduate

Tchad P. Sanger, University Registrar

Name: Schoen, Julian Toca
Student ID: 1066024

UNIVERSITY OF CALIFORNIA, SANTA CRUZ
1156 HIGH ST. SANTA CRUZ, CA 95064

Page: 1 of 2
Print Date: Dec 20, 2020

Official Undergraduate

DEGREES AWARDED:

Degree:	BACHELOR OF ARTS
Confer Date:	06/10/2010
Declared Major:	BA IN LITERATURE WITH HONORS
Sub-Plan:	(MODERN LITERARY STUDIES INTENSIVE)
College:	SEBASTIAN S. KRESGE COLLEGE

ACADEMIC PROGRAM HISTORY:

Program:	Undergraduate
Declared Major:	BA in Literature
Sub-Plan:	(Modern Literary Studies Intensive)
College:	Sebastian S. Kresge College

TEST CREDITS:
Test Credits Applied Toward Undergraduate

			ATMPT	ERND	POINTS
Test Trans GPA:	0.000	Transfer Totals:	8.00	8.00	0.000

Beginning of Undergraduate Record

FALL QUARTER 2006			ATMPT	ERND	GR	POINTS
KRSG	80B	RI:POWER&REPRESENTAT	5.00	5.00	B-	13.500
LIT	80S	ARISTOTLE'S POETICS	5.00	5.00	B+	16.500
PHIL	26	EXISTENTIALSM&AFTER	5.00	5.00	B	15.000
TERM GPA:	3.00	TERM TOTALS:	15.00	15.00		45.000
CUM GPA:	3.00	CUM TOTALS:	15.00	23.00		45.000

WIN QUARTER 2007			ATMPT	ERND	GR	POINTS
ANTH	3	INTRO ARCHAEOLOGY	5.00	5.00	B+	16.500
ASTR	4	THE STARS	5.00	5.00	B-	13.500
LIT	1	LITERARY INTERPRET	5.00	5.00	A+	20.000
PHYE	20A	BALLET	0.00	0.00	P	0.000
Course Topic:		Ballet I				
TERM GPA:	3.33	TERM TOTALS:	15.00	15.00		50.000
CUM GPA:	3.17	CUM TOTALS:	30.00	38.00		95.000

SPR QUARTER 2007			ATMPT	ERND	GR	POINTS
KRSG	199	TUTORIAL	5.00	5.00	P	0.000
LTMO	145B	MODERN LITERATURE	5.00	5.00	A	20.000
PHYE	20A	BALLET	0.00	0.00	P	0.000
Course Topic:		Continuing Ballet I				
THEA	60C	DEVELMT THEATR ARTS	5.00	5.00	B-	13.500
TERM GPA:	3.35	TERM TOTALS:	15.00	15.00		33.500
CUM GPA:	3.21	CUM TOTALS:	45.00	53.00		128.500

FALL QUARTER 2007			ATMPT	ERND	GR	POINTS
LIT	101	THEORY & INTERPRETN	5.00	5.00	A	20.000
PHYE	20A	BALLET	0.00	0.00	P	0.000
Course Topic:		Ballet II				
PORT	1A	ELMENTRY PORTUGUESE	5.00	5.00	A	20.000
WRIT	169	TUTORING WRITING	5.00	5.00	B+	16.500
TERM GPA:	3.76	TERM TOTALS:	15.00	15.00		56.500
CUM GPA:	3.36	CUM TOTALS:	60.00	68.00		185.000

WIN QUARTER 2008			ATMPT	ERND	GR	POINTS
LTEL	103K	AMLIT 1900 TO WWII	5.00	5.00	A	20.000
LTWL	117	NEW WORLD HIS&MEMRY	5.00	5.00	A	20.000
PHYE	15B	BASKETBALL	0.00	0.00	P	0.000
Course Topic:		Intermed Basketball				
PORT	1B	ELEMNTRY PORTUGUESE	5.00	5.00	A	20.000
TERM GPA:	4.00	TERM TOTALS:	15.00	15.00		60.000
CUM GPA:	3.50	CUM TOTALS:	75.00	83.00		245.000

SPR QUARTER 2008			ATMPT	ERND	GR	POINTS
LTEL	110D	19-20TH C.ENG NOVEL	5.00	5.00	A+	20.000
LTEL	170A	GEOFFREY CHAUCER	5.00	5.00	A	20.000
PORT	65A	INTERMED PORTUGUESE	5.00	5.00	B+	16.500
TERM GPA:	3.76	TERM TOTALS:	15.00	15.00		56.500
CUM GPA:	3.55	CUM TOTALS:	90.00	98.00		301.500

FALL QUARTER 2008			ATMPT	ERND	GR	POINTS
LTEL	280	ENGLISH LANG LIT	5.00	5.00	A-	18.500
MUSC	80C	HIST ELECTRONIC MUS	5.00	5.00	P	0.000
PORT	65B	INTERMED PORTUGUESE	5.00	5.00	B+	16.500
TERM GPA:	3.50	TERM TOTALS:	15.00	15.00		35.000
CUM GPA:	3.54	CUM TOTALS:	105.00	113.00		336.500

WIN QUARTER 2009			ATMPT	ERND	GR	POINTS
EDUCATION ABROAD PROGRAM - BRAZIL						
XPOR	101	INTENSV BEGIN PORT	6.00	6.00	A	24.000
TERM GPA:	4.00	TERM TOTALS:	6.00	6.00		24.000
CUM GPA:	3.56	CUM TOTALS:	111.00	119.00		360.500

SPR QUARTER 2009			ATMPT	ERND	GR	POINTS
EDUCATION ABROAD PROGRAM - BRAZIL						
XPOR	106	ADV INTERMED PORT	6.00	6.00	A	24.000
XPOR	124	BRAZ CULTURE & LIT	6.00	6.00	A+	24.000
XPOR	134	PORTUGUESE LIT III	6.00	6.00	B+	19.800
TERM GPA:	3.76	TERM TOTALS:	18.00	18.00		67.800
CUM GPA:	3.59	CUM TOTALS:	129.00	137.00		428.300

Term Honor: Dean's Honors

FALL QUARTER 2009			ATMPT	ERND	GR	POINTS
LTWL	109	TOPIC CULTRAL STUDY	5.00	5.00	B+	16.500
LTWL	150A	WORLDINGS	5.00	5.00	B+	16.500
PORT	199F	TUTORIAL	2.00	2.00	A+	8.000
TERM GPA:	3.41	TERM TOTALS:	12.00	12.00		41.000
CUM GPA:	3.58	CUM TOTALS:	141.00	149.00		469.300

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Tchad P. Sanger, University Registrar

JULIAN T. SCHOEN
(626) 272- 4697 http://www.julianschoen.com/ julian.schoen@lls.edu
222 N. Ave. 55, Los Angeles, CA 90042

Writing Sample

Description:

The attached writing sample is an order that I drafted during my externship at the United States District Court, Central District, with Judge Otis D. Wright II. The issue was whether to remand the claim to state court based on a lack of complete diversity in an employment discrimination case. The defendants removed the case to federal court, arguing that complete diversity was present because the non-diverse defendants were fraudulently joined, and thus should be disregarded for diversity purposes. However, to rebut a fraudulent joinder claim, a plaintiff need only demonstrate a non-fanciful possibility to state a claim against the relevant defendant. Here, the plaintiff satisfied this burden by making several non-fanciful racial discrimination allegations against the non-diverse defendants, which were not preempted by California's Workers' Compensation Act. Consequently, complete diversity was destroyed, and the case was remanded.

The names and dates have been modified to ensure privacy to the parties. Judge Wright gave me permission to use this as a writing sample.

O

United States District Court
Central District of California

ENO CENT,

Plaintiff,

v.

CORPORATE ENTERPRISES, et al.;

Defendants.

Case No. 2:22-cv-12345-ABC(XYz)

ORDER DENYING MOTION TO REMAND AND DENYING AS MOOT MOTION TO DISMISS[20][23]

I. INTRODUCTION

Plaintiff Eno Cent ("Plaintiff") seeks to remand this action to Los Angeles County Superior Court for lack of subject-matter jurisdiction. (Mot. to Remand ("Mot."), ECF No. 20.) Plaintiff argues that Defendants Corporate Enterprises ("Defendant"); Mickey Boss ("Boss"); and Minnie Supervisor ("Supervisor") (collectively, "Defendants") failed to establish diversity jurisdiction under 28 U.S.C. § 1332, because Boss and Supervisor destroy complete diversity. For the reasons discussed below, the Court **GRANTS** Plaintiff's Motion to Remand ("Motion") (ECF No. 20) and therefore **DENIES as moot** Defendants' Motion to Dismiss (ECF No. 23).[1]

[1] After carefully considering the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

II. FACTUAL BACKGROUND

Plaintiff's claims arise from the termination of his employment. (*See* First Am. Compl. ("FAC") ¶¶ 33–34, ECF No. 11.) Plaintiff filed this action in Los Angeles County Superior Court alleging the following claims against all Defendants: (1) racial discrimination in violation of California Government Code section 12940 *et seq.*; (2) retaliation in violation of California Government Code section 12940 *et seq.*; (3) failure to prevent discrimination and retaliation in violation of California Government Code section 12940 *et seq.*; and (4) wrongful termination in violation of public policy. (Notice of Removal ("Notice") 3, ECF No. 2.) Plaintiff also alleges two causes of action against individual Defendants Boss and Supervisor for (5) intentional infliction of emotional distress ("IIED"); and (6) defamation. (Notice 3.) Plaintiff is a citizen of California (FAC ¶ 9); Corporate Enterprises is a citizen of New York (Notice 5); and Boss and Supervisor are each citizens of California (Notice 6).

Plaintiff alleges he was hired in January 2035 as a handler, and eventually promoted to customer service agent ("CSA"). (FAC ¶¶ 16–17.) Plaintiff alleges that, in his over ten years working at Defendant, he was a hard worker in one of the busiest locations and was never reported for disciplinary action. (FAC ¶¶ 16–17.)

Plaintiff, an African American, alleges that he experienced continuous racial discrimination between January 2046 and January 2049. (FAC ¶ 18.) He claims that Boss made racists remarks directed at him and treated him disparately from his White colleagues. (FAC ¶¶ 18–28.) Plaintiff specifically alleges Boss: (1) claimed he was the "master of this place"; (2) stated Plaintiff would "scare" or "frighten" customers when wearing the company issued jacket with the hood up but never made such comments to other colleagues; (3) forced Plaintiff to work the hardest and heaviest assignments, without rotating between other CSAs—as was company policy—or allowing him to have an assistant, as other White employees had; and (4) prevented Plaintiff from taking breaks on site, wearing earrings, leaving tattoos exposed, and growing his hair out, although such behavior was tolerated for White and Hispanic

employees. (FAC ¶¶ 18–28.) Plaintiff further alleges that he was terminated as a result of racial discrimination. (FAC ¶ 34.)

On January 1, 2050, Plaintiff commenced this action in Los Angeles County Superior Court. (Notice 2–3.) Defendants removed the action to this Court on January 3, 2050, on the basis of diversity jurisdiction under 28 U.S.C. § 1332. (Notice 1.) On February 1, 2050, Plaintiff filed the instant motion to remand the action. (Mot.)

III. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). But courts strictly construe the removal statute against removal jurisdiction, and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing federal jurisdiction. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (citing *Gaus*, 980 F.2d at 566).

Federal courts have original jurisdiction where an action presents a federal question under 28 U.S.C. § 1331, or diversity of citizenship under 28 U.S.C. § 1332. A defendant may remove a case from a state court to a federal court pursuant to the federal removal statute, 28 U.S.C. § 1441, on the basis of federal question or diversity jurisdiction. To exercise diversity jurisdiction, a federal court must find complete diversity of citizenship among the adverse parties, and the amount in controversy must exceed $75,000, usually exclusive of interest and costs. 28 U.S.C. § 1332(a).

IV. DISCUSSION

This case turns on the existence of complete diversity. Defendants argue that Boss and Supervisor, California citizens, are fraudulently joined for the purpose of destroying diversity, and should therefore be disregarded. (Notice 6–7.)

"[O]ne exception to the requirement of complete diversity is where a non-diverse defendant has been 'fraudulently joined.'" *Morris v. Princess Cruises, Inc*., 236 F.3d 1061, 1067 (9th Cir. 2001). "Fraudulent joinder is a term of art and does not implicate a plaintiff's subjective intent." *Rangel v. Bridgestone Retail Operations, LLC*, 200 F. Supp. 3d 1024, 1030 (C.D. Cal. 2016) (*citing McCabe v. General Food Corp*., 811 F.2d 1336 (9th Cir. 1987)). When a plaintiff "fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state," fraudulent joinder exists. *Id*. Consequently, a defendant "must do more than show that the complaint at the time of removal fails to state a claim against the non-diverse defendant." *Padilla v. AT & T Corp*., 697 F. Supp. 2d 1156, 1159 (C.D. Cal. 2009). Instead, the defendant must demonstrate "there is no possibility that the plaintiff could prevail on *any* cause of action it brought against the non-diverse defendant." *Id*. (emphasis added); *see Macey v. Allstate Prop. & Cas. Ins. Co*., 220 F. Supp. 2d 1116, 1117 (N.D. Cal. 2002) ("If there is a non-fanciful possibility that plaintiff can state a claim under California law against the non-diverse defendants the court must remand.").

Furthermore, a defendant must prove fraudulent joinder through clear and convincing evidence. *Hamilton Materials, Inc. v. Dow Chem. Corp*., 494 F.3d 1203, 1206 (9th Cir. 2007). This may be done by "piercing the pleading" to consider summary judgment-type evidence like affidavits and depositions. *Morris*, 236 F.3d at 1068. Still, any ambiguity of law should be resolved in favor of the plaintiff. *Hamilton Materials, Inc*., 494 F.3d at 1206.

Here, Defendants argue that claims for IIED occurring within the employment context are preempted by the California Workers' Compensation Act. (Opp'n to Mot.

("Opp'n") 12–13, ECF No. 25.) Generally, "claims for emotional distress caused by the employer's conduct causing distress such as 'discharge, demotion, discipline or criticism' are preempted by the Workers' Compensation Act, even when the employer's acts causing the distress are intentional or outrageous." *Onelum v. Best Buy Stores L.P.*, 948 F. Supp. 2d 1048, 1054 (C.D. Cal. 2013); Cal. Lab. Code § 3601(a) ("[T]he right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment . . . .")

However, "a claim is not barred by Workers' Compensation Act when: (i) the employer's conduct contravenes public policy, or (ii) the employer's conduct exceeds the boundaries of the inherent risks of the employer-employee relationship." *Walker v. Avis Rent A Car Sys., LLC*, No. LA CV-15-01241-JAK (ASx), 2015 WL 13752943, at *4 (C.D. Cal. July 6, 2015).

Consequently, courts have routinely found discrimination to exceed the boundaries of inherent risks associated with the employer-employee relationship. In *Walker*, the plaintiff was severely injured on the job and claimed IIED against her managers for refusing to provide work accommodating her disability. *Walker*, 2015 WL 13752943, at *1–2. Defendants argued that the IIED claims were preempted by the Workers' Compensation Act; however, the court disagreed, emphasizing that "a finding that discrimination is a risk inherent in the employer-employee relationship would be problematic given the efforts made over the past several decades to eliminate such conduct from the workplace." *Id*. at *5; *see also Barsell v. Urban Outfitters, Inc*., No. CV-09-02604-MMM (RZx), 2009 WL 1916495, at *4 (C.D. Cal. July 1, 2009) ("Because this claim is based on allegations of disability discrimination, there is a non-fanciful possibility that the workers' compensation exclusivity provisions do not bar [the plaintiff's] claim.")

Here, Plaintiff's allegations against Boss concerning his earrings, hairstyle, and tattoos are managerial decisions that would fall under the Workers' Compensation Act exclusive remedy provision. *Onelum*, 948 F. Supp. 2d at 1054. However, Plaintiff's allegations that Boss made racially charged statements, prevented Plaintiff from having an assistant when White employees were permitted one, and consistently assigned Plaintiff the toughest jobs without rotating between other CSAs demonstrate potentially discriminatory conduct. *See Macias v. Levy Premium Foodservices Ltd. P'ship*, No. 2:14-CV-09220-SVW-PLA, 2015 WL 12747900, at *3 (C.D. Cal. Feb. 12, 2015) (finding IIED claim arising from discriminatory statements based on plaintiff's race and sex not preempted by Workers' Compensation Act.) Thus, because discrimination is not a risk inherent in the employer-employee relationship, there is a non-fanciful possibility Plaintiff may have a claim for IIED based on the allegedly discriminatory misconduct by Boss in the workplace. *Walker*, 2015 WL 13752943 at *5.

Defendants additionally argue that Plaintiff's allegations are insufficient to support an IIED claim against Boss and Supervisor. (Opp'n 13.) Specifically, they contend that Plaintiff fails to allege conduct that is extreme or outrageous. (Opp'n 14.)

California allows recovery for IIED claims based on conduct "so extreme and outrageous as to go beyond all possible bound of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Onelum*, 948 F. Supp. 2d at 1053. In *Onelum*, the plaintiff's allegations that the defendant-employer mocked his Nigerian accent and regularly threatened to terminate him was sufficient to plead extreme and outrageous behavior for his IIED claim. *Id.* Here, Plaintiff similarly alleges instances in which Boss made racially insensitive comments targeting his African American ethnicity, which may be sufficient to plead the extreme and outrageous element of an IIED claim. (FAC ¶¶ 18–23.)

Furthermore, Defendants carry the burden of establishing that a plaintiff could not cure the deficiencies in his Complaint by amending it. *Rangel*, 200 F. Supp. 3d at 1033. Thus, even if Plaintiff's Complaint fails to sufficiently state a claim for IIED, Defendants have not met their burden of establishing that Plaintiff is unable to amend his complaint to include additional facts that would properly state a claim. Thus, the Court finds that Plaintiff may bring an IIED claim against Boss, destroying diversity. Accordingly, the Court **GRANTS** the motion to remand on this basis.[2]

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Plaintiff's Motion to Remand and **DENIES as moot** Defendants' Motion to Dismiss. (ECF Nos. 20, 23.) This action shall be remanded to the Los Angeles County Superior Court, 111 North Hill Street, Los Angeles, CA 90012. The Clerk of the Court shall close this case.

IT IS SO ORDERED.

February 22, 2050

[2] As the Court finds that the IIED claim destroys diversity, it declines to assess whether Plaintiff's Defamation claim is adequately pleaded.

Applicant Details

First Name	**Loren**
Middle Initial	**M**
Last Name	**Scolaro**
Citizenship Status	**U. S. Citizen**
Email Address	**loren.scolaro@gmail.com**
Address	**Address** Street **1920 N. Milwaukee Ave., Apt. 505** City **Chicago** State/Territory **Illinois** Zip **60647** Country **United States**
Contact Phone Number	**4432851935**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2012**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 23, 2019**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marden Competition**

Bar Admission

Admission(s)	**Illinois**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy, Immigration**

Recommenders

Hershkoff, Helen
helen.hershkoff@nyu.edu
212-998-6715

Geistfeld, Mark
mark.geistfeld@nyu.edu
212-998-6683

This applicant has certified that all data entered in this profile and any application documents are true and correct.